# Central Law Journal.

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Considerable excitement has been created in South Carolina by the recent decisions of the federal courts involving the validity of the State dispensary and election laws of that State. The case involving the former arose upon the following state of facts. A citizen of Charleston early in the year ordered from New York a barrel of beer, from Baltimore a case of whisky, and from Savannah a case of California wines. He notified the dispensary constabulary of the fact that he had bought the goods, and warned them through counsel not to seize the goods. The goods were seized and confiscated. He thereupon brought suit against the constables making the seizure, and asked the court for an injunction restraining all constables, police or other officers from interfering with and seizing his property. He averred that the liquor was brought for his own consumption and private use, and not for sale. He attacked the dispensary law on the ground that it attempts to abridge the right of citizens to import into the State for their own use and consumption such liquors as they may desire, and is thus a restriction of commerce between the States in favor of the products of the State of South Carolina against the products of other States and countries, and in conflict with Article 1, sections 8 and 9 of the Constitution of the United States. Judge Simonton rendered a decision in this case in the United States Circuit Court at Columbia in which he declared that the court had jurisdiction of the case and that the action of the State officials under the provisions of the dispensary law were in violation of the interstate commerce law and granted the injunction asked for, saying: "It is sufficient for the purposes of this case to say: That in so far as the dispensary law forbids a citizen to purchase in other States and to import into this State alcoholic liquors for his own use and consumption, the products of other States, it discriminates against the product of other States. Such discrimination cannot be made under the guise of the police power. And further, in so far as this act permits the chief dispenser to purchase in other States alcoholic liquors and to import them into this State for the purpose of selling them, for use and consumption at retail within the State, and forbids all other persons from so purchasing and importing for their individual use and consumption, it discriminates against all other citizens of the State. It also makes a discrimination against all persons in the trade in other States who are not patronized by the State dispenser, forbidding them to seek customers within the State and to enjoy a commercial intercourse assured to others in this State. These conclusions rest on this discrimination; if it did not exist, and if all alcoholic liquors were excluded from the State, or if all persons were forbidden to import alcoholic liquors, or if the laws of South Carolina had declared that all alcoholic liquors were of such poisonous and detrimental character, and that their use and consumption as a beverage were against the morals, good health and safety of the State, other and different questions would arise."

About the same time was rendered a decision of United States Judge Goff, in a case brought to test the validity of the State registration and election laws. The substance of the latter decision is, in brief, that the requirement of certificates by the State registration law is unwarranted; that the registration law is unconstitutional as regards such requirements; that the constitutional convention act does not cure these defects; that the whole laws are unconstitutional; that the proceeding is not against the State, and that the Circuit Court is a court of the State of South Carolina as of the United States. Judge Goff made permanent an injunction against the enforcement of the South Carolina registration and election laws.

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The Supreme Court of Utah has decided in Mackey v. Enzensperger, 39 Pac. Rep. 541, that an act providing that in civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury is constitutional, following the ruling of the same court in Hess v. White, 9 Utah, 61, and Fred W. Wolf Co. v. Salt Lake City, 37 Pac. Rep. 262. These cases, however, are opposed to the almost overwhelming weight of authority to the effect that in the absence of any constitutional provision the right of trial

by jury implies a right to the concurrent judgment of twelve men upon the matter in issue, and that a statute authorizing the rendition of a verdict by any less number is unconstitutional and void. Jacksonville T. & K. W. Ry. Co. v. Adams, 33 Fla. 608; *In re* Opinion of Justices, 41 N. H. 550; Carroll v. Byers (Ariz.), 36 Pac. Rep. 499; Bradford v. Territory, 1 Okla. 366, 34 Pac. Rep. 66. It must be admitted, however, that the opinion in Hess v. White presents the opposite view with great force. It clearly disproves the conclusiveness of the argument that the jury meant by the constitution of the United States was one of twelve jurors acting unanimously, since that was the only jury known to the common law, by showing that other equally essential qualifications of a common law jury (*e. g.*, that the jurors should be freeholders), though in full force at the adoption of the constitution, have now became obsolete, and are not reckoned as essential to the right of trial by jury, and points out the non-essential character of unanimity and the advantages of the majority verdict in the following terse language: "Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury, any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive, in civil trials at common law, and under our constitution, this unanimity of verdict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions." This view, however, has no applicability to a criminal proceeding wherein a defendant can neither waive his right to be tried by a jury of twelve, nor be deprived by the legislature of his right to the unanimous verdict of those twelve. Allen v. State, 54 Ind. 461; Cancemi v. Peo, 18 N. Y. 128.

## NOTES OF RECENT DECISIONS.

EQUITY — REFORMATION OF INJUNCTION — BOND — SEAL. — The jurisdiction of a court of chancery to correct mistakes in contracts and agreements, to make them express the actual intent of the parties, is one of the ancient and well-established heads of the jurisdiction of that court. Where, by a mistake or oversight in the execution of an agreement, or an omission therefrom of a seal where one is necessary, if the terms used in the instrument purport on its face to be a sealed instrument, it will ordinarily of itself furnish the testimony showing the oversight or mistake, and a court of chancery will correct it. By the great weight of authority this jurisdiction of courts of equity may be invoked for the correction of omissions by oversight and mistakes of official bonds. And where the evidence is clear of a mistake or omission by oversight, which causes the instrument to be not in conformity with the intention of the parties, it will be reformed, even as against sureties. These principles were recognized by the Supreme Court of Illinois in Henkleman v. Peterson, 40 N. E. Rep. 359, where it was held that where an injunction bond recites that it is executed under seal, but by mistake no seals are attached, a court of equity will reform the bond as against sureties as well as principal, by adding the seals. The following is from the opinion:

This principle has been sustained in a long line of cases with a very great degree of uniformity. It was as early as 1815, in Wiser v. Blachly, 1 Johns. Ch. 437, where a guardian's bond was taken in the name of the people instead of in the name of the infant, and it was held by New York's great chancellor: Whether the surety is to be holden though the bond was taken in the name of the people instead of in the name of the infant, I have no difficulty in saying that it is within the ordinary jurisdiction of this court to correct such a mistake by holding the party according to his original intention and to consider the bond as taken to the infant. Where the intention is manifest, this court will always relieve against mistakes. . . . The court will do it in the case of a surety. The Inhabitants of the Town of Montville v. Haughton, 7 Conn. 543, was a case where Haughton was appointed collector of taxes and the selectmen required of him a bond with surety that he would faithfully collect and pay over, etc. Haughton, as principal, with one Thompson, as surety, executed the bond in the sum of $2,000, with a condition, etc. The bond was signed, but no seal attached, but was attested as "signed, sealed and delivered in the presence of." The court held: "It is found by the court that the seal was omitted in this case by mere mistake and accident. If the plaintiffs might sue on this agreement at law, it does not follow that they may not have relief in a court of equity. The plaintiffs are entitled to a bond the consideration of which cannot be inquired into at law;" and held that the correction should be made. In Olmsted v. Olmsted, 38 Conn. 309, a joint bond had been executed, and the surety had died, whereby his estate was discharged at law, a correction was sought

to make the bond several, and it was held: "Where the contract does not express the agreement or intention of the parties to the injury of the obligee, and that is clearly made to appear, equity will reform the instrument as well against sureties as principals." In U. S. v. Cushman, 2 Sumn. 434, Fed. Cas. No. 14,908, Judge Story held: "This is not a case, where the plaintiff seeks to have a bond, or other contract, joint in its form, reformed, so as to make it joint and several against a surety, living or dead. In such a case a court of equity will not interfere, unless there is the most plenary evidence to establish the fact, that it was the intention of all the parties, that it should be several, as well as joint. But, if such an intention is clearly established, courts of equity will enforce that intention when there has been an omission to express it by accident, or mistake, or fraud, as well against surety as against the principal debtor. Under such circumstances there is no distinction between the case of sureties and that of principals, for it is a mere specific performance of the original contract as understood by all the parties." In Bernards Tp. v. Stebbins, *supra*, bonds of a township were issued, signed by commissioners, and sold for value, but by mistake the seals were omitted therefrom, and refromation was had. In Probate Court v. May, *supra*, a bill was filed to correct an administrator's bond by affixing seals omitted through accident or mistake, and the correction was ordered. In Town of Rutland v. Paige, 24 Vt. 181, seals were omitted from a constable's bond by the sureties. They admitted that it was intended at the time that seals should be attached, but insisted they should be indemnified, and a correction was ordered. The principle that courts of equity may reform instruments against sureties as well as principals has been declared in Prior v. Williams, 3 Abb. Dec. 624; Clute v. Knies, 102 N. Y. 377, 7 N. E. Rep. 181; Huson v. Ditman, 2 Hayw. (N. C.) 504; Smith v. Allen, 1 N. J. Eq. 55; Butler v. Durham, 3 Ired. 589; Sikes v. Truitt, 4 Jones Eq. 361; Armistead v. Bozman, 1 Ired. Eq. 117; State v. Frank, 51 Mo. 98; Neininger v. State (Ohio), 34 N. E. Rep. 633. The principle as to the reformation of an instrument against a surety so as to make it express the intention of the parties is declared in this State in Edwards v. Schoeneman, 104 Ill. 278, where a married woman executed a mortgage with her husband on her own separate estate, which mortgage was to secure a debt of the husband, and, the description being uncertain, it was held that it might be corrected, and the mortgage foreclosed. This case last cited is in irreconcilable conflict in principle with what is held in Trustees of Schools v. Otis, 85 Ill. 179. In principle we can see no difference in the reformation of an instrument to make it express the intention of the parties whether a surety is a party to it or not. The consideration that extends to the principal also extends to the surety. The rights of the obligee are the same as to each, and each owes him the same duty. The bond in thiscase, with the evidence in the record, clearly shows it was intended to be sealed, and made a sufficient bond. Its recitals carry conviction that such was the intent. Neither ignorance of fact nor law could be relied on to show the contrary, and to declare an intent not to seal the same would be a declaration of an intentional fraud. In such condition of the record the court should have decreed a reformation of the instrument. The principle announced in Edwards v. Schoeneman, *supra*, is more in accord with the weight of authority than is Trustees of Schools v. Otis, and based on the better reasoning, and the latter case, so far as it is inconsistent with what is here stated, must be considered overruled.

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CRIMINAL LAW — HOMICIDE—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.—In Jones v. State, it is held by the Court of Criminal Appeals of Texas, that where a conviction for murder is based upon circumstantial evidence, an instruction which fails to require the facts and circumstances proved to exclude every other reasonable hyphothesis, except defendant's guilt, is erroneous. The court says:

The conviction is predicated entirely upon circumstantial evidence. Upon this subject the court charged the jury: "In order to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, leading in the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty of the guilt of the accused." Error is urged because this charge fails to instruct the jury that such evidence must be of so conclusive a nature as to exclude every reasonable hypothesis except the guilt of the accused. The essential element of an instruction on the law of circumstantial evidence is that the facts and circumstances necessary to the conviction sought must be such as to exclude every other reasonable hypothesis except the defendant's guilt. The evidence must not only be consistent with the prisoner's guilt, but it must be inconsistent with every other rational conclusion. Cone v. State, 13 Tex. App. 483, 486; 1 Greenl. Ev. § 34; People v. Shuler, 28 Cal. 490; People v. Strong, 30 Cal. 151; People v. Davis (Cal.), 1 Pac. Rep. 890; State v. Nelson, 11 Nev. 354, 440; State v. Jones (Nev.), 11 Pac. Rep. 317; State v. Shelledy, 8 Iowa, 477, 498; Com. v. Harman, 4 Pa. St. 269, 274; State v. Willingham, 33 La. Ann. 537; State v. Vansant, 80 Mo. 67, 72; Stout v. State, 90 Ind. 1, 12; Binns v. State, 66 Ind. 428, 435; Algheri v. State, 25 Miss. 584; Mose v. State, 36 Ala. 212, 221, 231; U. S. v. Jackson, 29 Fed. Rep. 503; 2 Thomp. Trials, § 2505; Com. v. Webster, 5 Cush. 296; U. S. v. Jackson, 29 Fed. Rep. 503; Casey v. State (Neb.), 29 N. W. Rep. 264. Mr. Starkie, in his work on Evidence (section 863), says: "The force of circumstantial evidence being exclusive in its nature, and the mere coincidence of the hypothesis with the circumstances being in the abstract, insufficient, unless they exclude every other supposition, it is essential to inquire with the most scrupulous attention what other hypothesis there may be which may agree wholly or partially with the facts in evidence." The court in Beavers' Case said: "We can conceive of no hypothesis by which, in the order of natural causes and effects, the facts proved can be explained consistently with the innocence of the prisoner; and this is the true test of circumstantial evidence. It excludes all reasonable doubt of the prisoner's guilt." 58 Ind. 531, 537. "But this principle applies only to proof of the act, and not to proof of the intent. Accordingly, in a case of burglary, an instruction which contained the following sentence

was properly refused: 'Where a criminal intent is to be establishd by circumstantial evidence, the proof ought to be not only consistent with the defendant's guilt, but it must be wholly inconsistent with any other rational conclusion than that of the defendant's guilt.' The court said: 'This rule is proper when the act which is claimed to be criminal is sought to be established by circumstantial testimony. But when the act is proved by direct testimony, and all that remains to be found is the intent which accompanied the act, and which may be inferred from the circumstances accompanying the act, then this principle does not apply.' It is to be observed that the courts do not state the principle in uniform language. Some of them prefix before the word 'hypothesis' or 'supposition' the word 'reasonable' or 'rational,' and others omit it. But, even where it is omitted, it is necessarily understood or implied, for the meaning is not that the evidence shall exclude an hypothesis which is unreasonable or absured." 2 Thomp. Trials, § 2505, and accompanying notes. It is not to be understood, however, that this rule requires the exclusion of every possible hypothesis but that of guilt. It means a reasonable doubt, a rational hypothesis, not a mere possible speculation, or imaginary doubt. Tested by the rule announced, the charge in this case is fatally defective, and must operate a reversal of this judgment.

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MUNICIPAL CORPORATION—MORAL OBLIGATION.—In Bailey v. City of Philadelphia, 31 Atl. Rep. 925, decided by the Supreme Court of Pennsylvania, it was held that a city, through its council, may recognize a moral obligation, as where a teacher appointed by a school board served till the court decided, against the contention of the school board, that confirmation of the appointment by the board of education, which was refused, was necessary. It was therefore held, it appearing that the council of the city in question had made an appropriation for compensation for such services and directed the drawing of a warrant, that an injunction would not be granted against the drawing and paying thereof. The court said in part:

A moral obligation, in law, is defined as one "which cannot be enforced by action, but which is binding on the party who incurs it, in conscience and according to natural justice;" and again, a "duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party, in that particular instance, from legal liability." 15 Am. & Eng. Enc. Law, 716. In this State it is held that such an obligation will sustain an express promise to pay, and, *a fortiori*, an actual payment. Hemphill v. McClimans, 24 Pa. St. 367; Stebbins v. Crawford Co., 92 Pa. St. 289; Leonard v. Duffin, 94 Pa. St. 218; Brooks v. Bank, 125 Pa. St. 394, 17 Atl. Rep. 418; Holden v. Banes, 140 Pa. St. 63, 21 Atl. Rep. 239; Kelly v. Eby, 141 Pa. St. 176, 21 Atl. Rep. 512. If a mere promise to pay under such circumstances would be enforced by law against an individual, certainly an actual payment, or its equivalent—an order by the councils on their ministerial officer, who has no duty in reference thereto but obedience—should be sustained against a municipal corporation. Councils, it is true, are trustees, and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city's legislative powers; and there is nothing in the law, or in sound public policy, to prohibit the city from being honest, and paying its *bona fide* debts, which are good in conscience and justice, though, for sufficient other reasons, there is a general rule which prevents them from being enforceable by law. The opinion of the learned judge below calls attention to some recent instances of similar municipal action; among them, that in regard to Mr. Oellers, who acted as city treasurer for a time under an election by councils to a vacancy which, it was subsequently decided, should be filled by the appointee of the Governor. Com. v. Oellers, 140 Pa. St. 457, 21 Atl. Rep. 1085. Councils passed an ordinance making compensation to him for his services. It would have been a very doubtfu public policy which would have compelled councils to proclaim in advance that the officer to be elected would get no compensation for his eight months or more labor and responsibility unless he could maintain his title *de jure* to the office, the mode of filli g which was then known to be in dispute. With such an announcement, it is not likely that the office would be accepted by any man of the character and abilities suited to that responsible position, but, rather, that it would go to some one who wanted it, in the language of the day, for "what there was in it."

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ATTACHMENT—FAILURE TO GIVE BOND—EFFECT.—In Austin v. Goodbar Shoe Co., 30 S. W. Rep. 888, the Supreme Court of Arkansas decides that taking advantage of the failure to file an attachment bond is a personal right of the defendant which cannot be asserted by a stranger to the suit. Upon the law of the case the court says:

The only question in this case is as to the effect the failure to give the attachment bond had upon the judgment in attachment in favor of appellee. In Ford v. Hurd, 4 Smedes & M. 683, the Supreme Court of Mississippi held, on the motion of a garnishee, that, when no bond had been filed, a judgment in attachment was absolutely void. So in the case of Houston v. Belcher, 12 Smedes & M. 514, the same court held, on the motion of a non-resident, that the judgment was void where no bond had been filed. It is to be remarked, however, that in Mississippi they have a statute which expressly declares a judgment void where no attachment bond has been given. In Kentucky they have a statute similar to the one in Mississippi, and formerly the strict rule was applied as in Mississippi. Martin v. Thompson, 3 Bibb, 252; Samuel v. Brite, 3 A. K. Marsh. 317. But afterwards the rule was relaxed, and the Supreme Court of Kentucky in Banta v. Reynolds, 3 B. Mon. 80, held that the expression in the statute making judgments in such cases void was incautiously inserted therein, and that it could only mean that such judgments were voidable. In Wagener v. Booker, 31 S. C. 375, 9 S. E. Rep. 1055, the Supreme Court of South Carolina, where the statute is not exactly similar to ours, but rather more strict, held that the failure to file a bond properly signed by the plaintiff was jurisdictional error, and, on motion of defendant, the judgment was set aside. And yet in the case of Camberford v. Hall, 3 McCord,

345, the same court said: "It has been repeatedly held by this court that the garnishee cannot take advantage of any error or irregularities in the proceedings against the absent debtor. The protection which the law has furnished to the property of the absent debtor is intended for his benefit, and not that of a third person. The bond which the law requires is to shield him from unjust suits. If he, therefore does not think fit to complain that the bond has not been taken in conformity with the requisition of the act, why should any other be permitted to do so? But it is said the act declares the attachment void if the bond be not taken in double the sum to be attached, and that, the bond not being so taken, the court is bound, on motion of any one, to set aside the judgment, and dismiss the attachment as a mere nullity. The court is not bound to set aside a judgment on any ground of error or irregularity as already stated, except at the instance of the defendant. A judgment is not void because it is erroneous. If it be rendered by a court of competent jurisdiction, it must remain until arrested or reversed (citing cases). The word 'void,' when used in a legislative act, or such a subject as the one embraced in this act, is to be understood synonymously with 'voidable;' that is, it will be declared void on pleading." This latter reason is in accord with that of the Supreme Court of Kentucky in Banta v. Reynolds, *supra*. In Van Loon v. Lyons, 61 N. Y. 22, where there was no attachment bond, an attachment and the judgment founded thereon were held void, because there could be no presumption of jurisdiction in the District Court of New York City in which the judgment was rended, it being an inferior court. In O'Farrell v. Stockman, 19 Ohio St. 296, the Supreme Court of Ohio said: "The simple question, therefore, was whether the attachment was absolutely void for want of an undertaking. The common pleas and district courts held that it was not. In this we see no error. The undertaking is not essential to jurisdiction in attachment. It is designed exclusively for the benefit of the defendant. He may waive it, and the omission to file it is a mere irregularity, of which he alone can take advantage. The effect of the omission is to render the proceedings voidable, but not absolutely void." The Ohio statute on the subject is nearly identical with ours. The only case we have been able to find in which a judgment in attachment was set aside for want of attachment bond at the instance or on the motion of another than the defendant in the attachment proceedings is the case of Ford v. Hurd, 4 Smedes & M. 685, cited above, where the proceedings and judgment were declared void, and set aside, at the instance of a garnishee; and there appear in that case two special reasons for that,—one because the statute in that State expressly so declares all such proceedings and judgments, as has been stated; and the other, because, as stated by the court in that case: "The attachment, being void for this reason, could not justify a judgment against the garnishee, and it was the duty of the garnishee to see that the law is pursued. This is a duty which he owes to his creditor, but especially to himself, as it would be no bar to a subsequent recovery if he should permit judgment to go against him on an attachment which was absolutely void." In Sannoner v. Jacobson, 47 Ark. 31, 14 S. W. Rep. 458, this court held that 'a junior attaching creditor may intervene in a prior attachment suit, and there contest his rights with the plaintiff in that suit; but he cannot be let in to defend the suit and dispute the grounds of the attachment in lieu of the defendant, nor to defeat the attachment for mere errors or irregularities in the proceedings, but only for imperfections which are unamendable and render the proceedings void." We quote from the syllabus.

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LANDLORD AND TENANT — LEASE — WARRANTY OF FITNESS.—In Clifton v. Montague, 21 S. E. Rep. 858, the Supreme Court of West Virginia has recently made an interesting application of a well settled principle. It was held that where a written lease described the property as "the premises known as 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there was no implied covenant on the part of the lessor that there were on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they were leased; that the words "including six salt wells," contained in said lease, created no implied warranty that there were six salt wells on said premises of any particular quality or fitness for manufacturing salt. The court said, in part:

The weight of authority, however, as we understand it, is that there is no implied warranty as to the fitness of the leased premises for the purposes for which it is leased. So, in the case of Harlan v. Navigation Co., 35 Pa. St. 287, it was held that "a lease of the right to mine coal in the land of the lessor is the grant of an interest in the land, and not a mere license to take the coal. In such a case there is no implied warranty that the land contains coal veins;" and that, "if the parties to a coal lease were under a mutual mistake as to the existence of coal veins in the land demised, the proper remedy of the lessee is by a proceeding to rescind the contract; he cannot have relief in an action in affirmance of it." In the case of Sutton v. Temple, 12 Mees. & W. 52, Park B., held as follows: "With respect to the other and principal question in this case, viz., whether a contract or condition is implied by law, on the demise of land, that it shall be reasonably fit for the purpose for which it is taken, if the question were *res integra*, I should entertain no doubt at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking. The law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If it included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purposes for which the tenant took them, and it is difficult to see where such a doctrine would stop." In the case of Clark v. Babcock, 23 Mich. 164, it was held that a lease of a salt well implies no covenant that the well shall be of any productive capacity. In the absence of any distinct agreement, the lessee takes it as he finds it. And in the case of Kilne v. McLain, 33 W. Va. 32, 10 S. E. Rep. 11, this court held that "a lessee of a store room cannot recover in an action of *assumpsit* against his lessor for damages sustained by reason of the failure

of said lessor to repair damages to such building caused by unavoidable accident, where there is a written lease between said contracting parties, in the absence of an express covenant that said lessor should make such repairs," and that where a written lease of such building provides that the lessee shall keep the same in repair, except as to "unavoidable accidents and natural wear and tear," the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents, and a demurrer will be sustained to a declaration setting forth these facts in a special count that 'the lessee in such an action will be confined to the terms of the written contract declared upon, and cannot recover upon a verbal contract or understanding made or had contemporaneously with said written lease." Washburn on Real Property (volume 1, p. 537, sec. 7), states the law as follows: "Without an express contract on the part of the lessor, he cannot be held liable for repairs made by the tenant upon demised premises. Nor would he be bound by a parol promise to make repairs if such promise is founded only upon the relation of landlord and tenant. · · · Among the cases which might be cited upon this point, a canal company made a lease of a water power which had been created by the construction of the canal. It was held not to constitute a covenant on the part of the lessors to keep the canal in repair or supply it with water; and, if the canal was discontinued, the lessee was without remedy. Trustees v. Brett, 52 Ind. 410. So, the lease of a water power out of a mill pond then existing was not held to constitute an obligation on the part of the lessor to keep the dam in repair. Morse v. Maddox, 17 Mo. 569. And a grant of a right to take water from a well does not bind the owner of the well to repair it."

## STOCKHOLDERS, THEIR STATUTORY LIABILITY AND THE REMEDY OF CREDITORS.

*Nature of Statutory Liability.*—It is well settled that the extraordinary liability of stockholders in corporations, known as statutory liability, does not exist except when fixed by statutory or constitutional provisions.[1] Sometimes these statutory provisions are found in the charters of corporations as in the cases above cited. In the first of the cases the provieion in the charter of the bank was: "Each stockholder, copartnership or body politic, having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her or their share or shares." In relation to the nature of the liability, the court said: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law." Because in derogation of the common law these statutory, charter and constitutional provisions are strictly construed.[2] But it is also held that these statutes, being remedial, should be liberally construed.[3] Other courts have held that these provisions should receive a rational or equitable interpretation, as it is called.[4] On this point a leading text writer, Mr. Morawetz, in speaking of these statutory provisions, says: "To lay down any arbitrary rule for the construction of a particular class of statutes is manifestly contrary to reason, and can only lead to error and perversion of justice."[5] When the liability is claimed under a charter, statutory or constitutional provision enacted or adopted after the creation of the corporation, serious questions often arise as to their constitutionality.[6] As to corporate debts already incurred such provisions for an increased liability of the stockholders are rightly held unconstitutional and void,[7] except in case where the right to amend is reserved. It is held that a repeal of the law fixing the liability or a reduction of the liability under it is invalid as to creditors,[8] with above exception, of course. The law is well stated by the Supreme Court of the United States as follows: "Now, it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted on the faith of this liability."[9] Here the court was construing a charter provision; but it is generally held that statutory or constitutional provisions create a contractual

[1] Terry v. Little, 101 U. S. 216, Law. Ed. 25, p. 864; Pollard v. Bailey, 20 Wall. 520, Law. Ed. 22, p. 376.

[2] Cook on Stockh., § 214; 23 Am. & Eng. Encyc. of Law, p. 869, note 7.

[3] *Id.*, pp. 869-70 and note 1, citing cases from N. Y., Ind., and Ill.

[4] *Id.*, p. 870, note 2, citing cases from the courts of Mich., N. H., Cal., Mass., Vt., Ga., and Me.

[5] Mor. on Priv. Corp., § 880.

[6] Cook on Stock and Stockh., §§ 213 and 497; 23 Am. & Eng. Encyc. of Law, p. 868.

[7] 23 Am. & Eng. Encyc. of Law, p. 868.

[8] *Id.*, p. 869 and note 1.

[9] Hathorn v. Calif, 2 Wall. 10; Bk. 17, Law. Ed. 776.

liability also.[10] And, therefore, in case of the death of a shareholder the liability survives.

*Is the Liability Primary?*—A leading case on this question is Queenan *et al.* v. Palmer *et al.*;[11] here the charter of the savings bank provided: "That the stockholders of said corporation shall be responsible in their individual property, in an amount equal to the amount of stock held by them respectively, to make good all losses to depositors or others." The court says: "It simply creates a liability upon the stockholders or others; and whatever that responsibility may be, it is primary and exists with the liability of the bank to its depositors or others." Under the California statute, it is held that the stockholders are principals and not sureties.[12] Under the New York statute, the liability is held to be primary.[13] The statute reads: "All the stockholders of every company incorporated under this act shall be severally, individually liable to the creditors of the company in which they are stockholders," etc. The court says: "The allegations in the complaint are sufficient to establish a perfect cause of action against the defendant as a stockholder, primarily liable for the debts to the amount of his stock."

*Is the Liability Secondary?*—In Thompson on Liability of Stockholders, the rule is laid down and some authorities cited to the effect that the liability of the stockholders is secondary.[14] This becomes important when it comes to enforcing a remedy. If the liability be primary, then a creditor may proceed at once against a stockholder without waiting to exhaust all the assets of the insolvent corporation; if secondary, he must wait till that has been accomplished. As bearing on this point, it is well to notice that in Flash v. Conn, *supra*, the court said that the fact that the receiver had closed out all of the assets made it unnecessary to issue an execution and have it returned *nulla bona*, and it is laid down as according to the weight of authority, that corporate creditors must first exhaust their remedy against the insolvent corporation before proceeding against the stockholders.[15] This seems to sustain the proposition that the liability is secondary. But where the property of the insolvent corporation is in the hands of a receiver, or if for any other reason, it is clear that it would be useless to issue an execution, it will not be required as a condition precedent to bringing suit against the stockholders.[16] But under sec. 4, art. XI, of the Nebraska constitution, it is held that the claim of the creditor must first be "ascertained" judicially by being reduced to judgment against the corporation, and that execution must be issued thereon and returned *nulla bona* before the creditor may sue the stockholder.[17] Under the Ohio constitution and statute, the liability is held to be secondary and not primary.[18] "The liability of the stockholder to the creditor may be regarded as a collateral obligation of the stockholders for the benefit of the creditors, by which the former become sureties to the latter for the debts of the corporation."[19]

*The Remedy.*—In Cook on Stock and Stockholders, Sec. 221 and notes, the rule is laid down as follows: "And, in general, unless the statute prescribes otherwise, the common law rules as to liability of partners and the remedies for enforcing that liability, apply to the statutory liability of share owners in incorporated companies."

A careful examination of the large number of cases in which questions relating to the remedy have arisen will be necessary before the practicing lawyer can make a practical application of the above rule to any case he may have in hand. So much depends upon the language of the statutory or constitutional provision. To quote from the note in Cook on Stockholders just cited, where the state of the authorities is so well stated: "It is obvious that the question whether the cred-

[10] 23 Am. & Eng. Encyc. of Law, 870; Cochran v. Weichers, 119 N. Y. 399; Richmond *et al.* v. Irons, 121 U. S. 27; Bk. 30, Law. Ed. 864.

[11] 7 N. E. Rep. 613 (Ill.).

[12] Hyman v. Coleman, 82 Cal. 650; Young v. Rosenbaum, 39 Cal. 646.

[13] Flash v. Conn, 109 U. S. 371; Bk. 27, Law. Ed. 966.

[14] § 312; also see § 259.

[15] Cook on Stock & Stockh., § 219; 23 Am. & Eng. Encyc. of Law, pp. 885-6.

[16] Cook on Stock and Stockholders, Sec. 219 and cases cited; Thomp. Liab. of Stockh., § 321; Morgan v. Lewis, 46 Ohio St. 1; 23 Am. & Eng. Encyc. of Law, pp. 886-7.

[17] Globe Pub. Co. v. State Bank of Crete, 41 Neb. 175 (59 N. W. Rep. 683).

[18] Harpold *et al.* v. Stobart, 46 Ohio St. 497; Barrick v. Gifford *et. al.*, 47 Ohio St. 184; Wright v. McCormack, 17 Ohio St. 86.

[19] Hicks v. Burns, 38 N. H. 145; Jacobson v. Allen, 12 Fed. Rep. 454.

itor, in pursuing his remedy against the shareholder, may sue one or any of the shareholders at his option, or must sue all in a joint action, is of the highest importance. It goes to the very form and essence and content of his action; but it is a point upon which, as has already been intimated, a text writer cannot deduce from the reported cases any clearly settled rule of general application. It is in every case where the statute does not contain an explicit provision, a question of construction to be determined by the courts in expounding the words of the statute." Many authorities hold that the remedies should always be in equity.[20] In section 222, Mr. Cook well states the reasons why the remedy in equity is the best, viz: "It enforces once for all the liability of the stockholders, and at the same time provides for contribution. It distributes the assets equally and equitably among all the corporate creditors. It prevents a multiplicity of suits and avoids the difficult question whether a suit at law will lie." In Morley v. Thayer,[21] the court says: "When no remedy is provided by statute, the courts of Massachusetts restrict the remedy to a suit in equity and refuse to sustain an action at law. Actions at law or suits in equity are sometimes maintained in the courts of New York; but the courts of both these States agree that where the remedy is a new one and is given by statute, the creditor is limited to the mode of proceeding prescribed by the statute," citing several authorities.[22] In seeking a remedy two things must be carefully observed, viz: The language of the provision creating the liability; and whether a remedy has been expressly prescribed. Sometimes the language fixing the liability in express terms creates a proportional liability, as in Pollard v. Bailey, *supra*, where, as the court says: "Each stockholder is bound for the debts in proportion to his stock." As also in Terry v. Little, from which the charter provision of the insolvent bank is quoted at the beginning of this article. Or the liability may be unconditional and limited simply by the amount of stock held, as, for instance, in the Nebraska constitution,[23] which reads: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held, to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder." Under the Ohio constitutional provision, followed by statutory enactment, the Ohio court has held the liability to be collateral, and that "each stockholder sought to be so made liable has, in order that his liability may be confined to his just proportion, the right to insist that all stockholders within the jurisdiction and solvent, who stand in the same relation to the debts with himself, shall be brought in and be held to their proportionate liability with him."[24] And it seems that those provisions construed by the court as above, were in effect substantially the same as the provision hereinbefore quoted from the constitution of Nebraska. A stockholder who pays a company debt may enforce contribution from other stockholders.[25] This, of course, under the general rule, gives a creditor the right to proceed for himself and on behalf of all other creditors against all of the stockholders in a suit in equity in which the court will ascertain the amount of all the indebtedness and apportion it among the several creditors. And in order to prevent a multiplicity of suits the court will enjoin actions at law.[26] The doctrine that equity is the proper tribunal finds support by analogy in the interpretation by the courts of provisions fixing a liability upon officers of corporations who assent to the incurring of an indebtedness in excess of a sum named or a certain per cent. of the capital. In some of these the courts hold that equity jurisdiction is exclusive.[27] There is this difference, however, that in such case the liability is often held to be penal, as shown by cases cited in Cochran against Weichers, *supra*.

[20] 23 Am. & Eng. Encyc. of Law, p. 894, and many cased cited; Thomp. on Liab. of Stockh., ch. 16 and § 258, *et seq.*, and § 312; Cook on Stock & Stockh., § 222 and all of ch. 12; Queenan v. Palmer (Ill.), 7 N. E. Rep. 613.

[21] 3 Fed. Rep. 737-41.

[22] Briggs v. Penniman, 8 Cow. 367; Slee v. Bloom, 19 John. 456; Poughkeepsie v. Ibbotson, 24 Wend. 473.

[23] § 7, art. 11, title: Miscellaneous Corporations.

[24] Harpold *et al.* v. Stobart, 46 Ohio St. 497.

[25] Cook on Stock and Stockh., § 227; Terry v. Little and Pollard v. Bailey, *supra*.

[26] Chi. N. W. Ry. Co. v. Dey *et al.*, in Federal Court for Iowa, 1 L. R. A., 744 and note; 1 Pom. Eq. Jur., §§ 169-181; 3 *Id.*, §§ 1360-5; High on Inj., § 1549.

[27] Wolverton *et al.* v. Taylor & Co. (Ill.), 2 Am. Ry. & Corp. Rep. 369, 23 N. E. Rep. 1007; Hornor v. Henning, 93 U. S. 228; Bk. 23, Law. Ed. 879; Low v. Buchanan, 94 Ill. 76; note to Cochran v. Weichers *et al.*, 2 Am. Ry. Corp. Rep. 377.

*The Remedy at Law.*—Under some statutes it is held that an action at law may be maintained by one creditor against one stockholder or more.[28] But the clear weight of authority is in favor of the remedy in equity, when the provision creating the liability provides none.

*Who may Maintain the Action.*—When the remedy is in equity the better rule is that all creditors may sue all stockholders, or one creditor may sue for himself and on behalf of all other persons similarly situated; and other creditors may then come in and avail themselves of the benefits of the action. If the remedy be by an action at law then one creditor may sue one stockholder, except possibly in some cases where the liability is joint, when, of course, all stockholders must be joined as defendants. Inasmuch as the claims against the stockholders cannot be listed as part of the assets of the corporation they cannot be transferred to an assignee, nor do they pass to a receiver, and therefore neither can maintain a suit to enforce them.[29] The creditor is held to stand "on an independent platform, above that of a receiver, having no concern with the corporation, and the stockholder is bound under the law to answer to him.[30] "Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for payment of the debts of the insolvent."[31] So held after the court had determined that the liability of the stockholder was collateral. But it is held that stockholders in national banks may be sued by receivers under the provisions of the act of June 3d, 1864.[32]

*Parties Defendant.*—In seeking a remedy, of course, the question of parties defendant will have to be taken into consideration. It becomes important to consider what effect upon the liability of stockholders the transfers of stock may have had, and for this purpose an examination of the books of the company may be necessary. The effect of the transfers of stock often must be determined from the language of the provision creating the liability. Some of the courts have held that only those stockholders are liable who held stock when the debt was contracted.[33] On this question the Illinois Supreme Court says: "In our opinion, it is sufficient that appellant was a stockholder when the suit was brought. The liability is because of being a stockholder; that is because of the ownership of stock."[34] But it is also held that only those are liable who are stockholders at the time an action is brought by a creditor to enforce the liability.[35] Mr. Morawetz considers that the liability passes to the transferee by novation, and thinks it the better rule to proceed against existing stockholders.[36] The courts of Massachusetts, Maine and Missouri, hold to this rule also. By another class of cases all stockholders are held liable, whether they held stock when the debt was contracted or at the time suit was brought.[37] But this liability does not extend to those who had transferred their stock prior to the incurring of the indebtedness by the company. When liability once attaches it cannot be avoided by a transfer of the stock.

WILLIS L. HAND.

Kearney, Nebraska.

[28] Cook on Stock & Stockh., § 221; Flash v. Conn, *supra*; 23 Am. & Eng. Encyc. of Law, p. 888, citing California cases.

[29] Cook on Stock and Stockh., § 218; Umstead v. Buskirk, 17 Ohio St. 113; Wright v. McCormick, 17 Ohio St. 86-95.

[30] Arenz v. Weir, 89 Ill. 25.

[31] Jacobson, Receiver, v. Allen, Exr., 12 Fed. Rep. 454.

[32] § 5151, Rev. St. U. S. 1878; Kennedy v. Gibson, 75 U. S. 498, Bk. 19, Law. Ed. 476; Casey, Rec., v. Galli, 94 U. S. 673, Bk. 24, Law. Ed. 168; United States, *ex rel.* Citizens' Nat. Bank v. Knox, Comp., 102 U. S. 422, Bk. 26, Law. Ed. 216.

[33] 23 Am. & Eng. Encyc. of Law, 884, and large number of cases cited.

[34] Root v. Sinnick, 120 Ill. 350, 11 N. E. Rep. 339. See also Thomp. on Liab. of Stockh., § 90; Wheelock v. Kost, 77 Ill. 298; Brown v. Hitchcock, 36 Ohio St. 681.

[35] Cleveland v. Burnham, 55 Wis. 598, 13 N. W. Rep. 677, construing a statute providing that the transferee should succeed to all liabilities of prior holders of stock transferred.

[36] Mor. on Priv. Corp., § 888.

[37] 23 Am. & Eng. Encyc. of Law, p. 885, and many cases cited.

## INTOXICATING LIQUOR—SALE WITHOUT LICENSE.

### HUNTER V. STATE.

*Supreme Court of Arkansas, March 9, 1895.*

One who solicits others to join with him in the purchase of a quantity of whisky, receives from each the money to pay for the share such person wants, and

afterwards buys and distributes it among those so joining in its purchase, is guilty of selling liquor without a license.

BUNN, C. J.: The defendant, John Hunter, was indicted, tried, and convicted, in the Franklin circuit court, Ozark district, for "selling liquor without license," and appeals to this court. There are what purport to be two bills of exceptions in the case, one certified by the circuit judge, and the other by bystanders. But for the purposes of this decision there is no very great difference between them. The substantial facts are that the defendant desired to purchase a less quantity of whisky than the distiller from whom he wished to buy was authorized to sell. He therefore went among his neighbors, to solicit them to go in with him to make up a "keg" of five gallons,—the least quantity the distiller could sell,—taking their names, and the amounts they respectively agreed to take, and the amount of money each was required to pay, at the rate of two dollars per gallon; and, when the aggregate amount of all was five gallons, he went to the distiller, purchased a five gallon keg, had him carry it to an "old storehouse" in Mulberry, where, according to a previous understanding, he and all the subscribers were to be present for distribution, and perhaps payment. The evidence shows that defendant put a faucet in the keg when it arrived at the old storehouse, and then proceeded to draw off each one's share as he presented himself, and in this way the whisky was delivered to each of the subscribers. It does not affirmatively appear that defendant had any other interest in the whisky, or the sale thereof, than is suggested by the arrangement to procure it, which is set forth in the foregoing statement, or that he was acting for the distiller expressly. It was settled by this court in the case of Foster v. State, 45 Ark. 361, that: "When a party, with the money of a minor, purchases liquor for him, he is not only an agent of the minor for the purchase, which is not punishable, but he is also an aider and procurer of the sale, and therefore punishable as a principal in violating the statute inhibiting sales to minors. In misdemeanors, all persons who procure, participate in, or assent to the commission of a crime are regarded as principals, and indictable as such." It was contended by defendant's counsel in that case that defendant was the purchaser of the whisky, and not the seller; and that, since the act of buying liquor is not prohibited or punishable, he had not violated the law. It was also contended that defendant bought the whisky as a matter of favor to the minor; and also, as in this case, that defendant was not in any wise interested in the sale of the whisky, and that he simply gave his time and trouble, without any reward or remuneration. The offense in that case was selling liquor to a minor. There can be no doubt that the law's inhibition had been overridden. It was shown that the owner of the whisky was ignorant that the whisky he sold to defendant was really intended for another person, and he a minor; and the proof further showed that the very reason the minor procured the defendant to buy the whisky for him was to shield the saloon keeper from any trouble growing out of the transaction. The ignorance of the saloon keeper of the facts had doubtless the effect of relieving him from prosecution. But the defendant had aided and abetted in what the law denounced as, and declared to be, a crime, namely, "selling liquor to a minor." That being a misdemeanor, defendant, who had thus aided in its commission, was held to be a principal, and accordingly his conviction was sustained. The gravamen of the defense was, in fact, that there was no crime committed, because no one knowing the facts had in truth sold liquor to the minor. The ruling of the court was otherwise, however, and that, not only was there a crime committed, but he who had made himself a necessary instrument, through whom the minor had bought the liquor, was the guilty party. In other words, the evil thus entailed upon society could not thus be made to fail of the law's apprehension and correction by any sort of manipulation or legerdemain to deprive it of an apparent author, or to mystify the real responsibility for it. It is alleged, in effect, in the case at bar, that there has also been a violation of the law—a crime—committed, in this: That one Dock Cox and others, each and every one of them, became the purchaser of a quantity of whisky less than five gallons, procured from the distiller through the instrumentality of the defendant, neither one having authority to sell to said Cox and the others, or to any one of them, said quantity of whisky. As in the case of Foster v. State, *supra*, the defense in this case is that there was really no selling of liquor without a license; that defendant, on the contrary, was a buyer for himself and others, and not a seller, and that he had purchased five gallons from the distiller,—a quantity he had a lawful right to sell him, the defendant; that in fact there was no violation of the law in the transaction. Defendant also showed that he had no interest in the whisky other than as is shown in the evidence, and that he was not the agent or the employee of the distiller. Except a difference between the two acts constituting the alleged violations of the law, the facts in this case do not appear to be materially different from those involved in the Foster Case, above cited; and to our minds the principle governing each of the two cases is the same. The alleged offense in the one case was selling liquor to a minor, and in the other case was selling liquor without license; the owner of the liquor in each case being ignorant, or presumably so, of the final disposition of the same. In the Foster Case the defendant was held liable because he had aided the owner in committing the crime, although, as to the owner, it might not have been a crime, because of his ignorance of the design to sell to the minor. Now, since all aiders and abettors in misdemeanors are to be regarded as principals, Foster

was held to be such. and was held punishable as the direct seller would have been.

The remaining inquiry is whether or not the sale of the whisky in the manner set forth in evidence was in fact in violation of the statute, as constituting a sale in less quantities than five gallons. Unless this sale would have been a violation of the statute on the part of the distiller, had he been cognizant of all the facts, and knowingly participated in it, there does not seem to be any reason why the defendant should be held liable; for his offense, after all, is the aiding and abetting the distiller to sell in violation of the law, and thereby becoming himself a principal offender. The distiller, having the privilege of selling not less than five gallons to one individual at one time, and that five gallons to be in an original package, is unable to find a purchaser for such a large quantity. He therefore, with the air of a coadjutor, procures subscriptions from a number of persons each to purchase a less quantity than the five gallons,—in fact, the aggregate quantity purchased by all to be the five gallons,—and the aggregate sum contributed by all to be deposited with the "go-between," to be paid for the package, and then the same to be subsequently divided among the several purchasers as their several subscriptions call for. The State, in effect, contends that this kind of a transaction would be a violation of the law, as being a mere device to avoid its penalties; and we think her contention is sound. To hold otherwise, in our opinion, would be but creating a means by which the prohibition against the seller would be rendered of non-effect and a mere dead letter on the statute books. It would enable persons most easily to cheat the law, deprive the government of her lawful revenues, and even infringe upon the privileges of those who have lawfully procured licenses to sell in quantities less than five gallons. If this would be true of the owner knowingly dealing in this manner under the rule in the Foster Case, the defendant is made liable, for it matters nothing that the owner is really guilty or not, for in that case the court said: "Taylor & Peyton's (saloon keepers) guilt is immaterial. The guilt or innocence of the actor or principal in the first degree, even in felonies, does not affect the guilt of the principal in the second degree, to make use of a common-law term, and it is immaterial whether the person who was the chief actor in making the sale might or might not have been convicted. However men combine, each one is criminally responsible for what he personally does, for the whole of what he assists others in doing, and for all that the others do through his procurement." Quoting further, but changing the language to suit the facts of the case: The appellant had the evil design of procuring a sale of liquor to each of several persons in a less quantity than five gallons,—a sale the owner had no lawful right to make; and his disclaimer of all profits in the transaction only goes to add the greater weight of truth to the theory we apply to the facts of this case. It is said by appellant's counsel, in argument, that "any personal property may be purchased and held by the purchasers as tenants in common." But a tenancy in common is not created by several purchases of distinct and specific portions of common property, for it is said: "Tenants in common are generally defined to be such as hold the same land together by several and distinct titles, but by unity of possession, because none knows his own severalty, and therefore all occupy promiscuously." Black, Law Dict. The purchases in this case were not like the purchases made by the servant or employee of a club, or partnership, or other persons acting in a body as one person, for in such case each does not buy a specific quantity, but the body buys, and each member of the body has an interest, not in any particular part or portion of the whole, but in every drop and particle,—something after the manner of a tenancy in common. Apparently a different doctrine prevails in Alabama and Mississippi. In Johnson v. State, 63 Miss. 228, it was held that, where two put their money together, and purchased a gallon of whisky, —that being the least quantity the owner was privileged to sell,—there was no violation of the law. This decision was based on two grounds,—one that "penal statutes must be construed as not to embrace cases not plainly within their meaning and letter;" and the other that the facts did not show a sale from the one to the other, but that both were buyers, and not sellers. The case of Foster v. State, *supra*, directly controverts both these grounds. It is the spirit, and not the letter, of the law we are called upon to administer in these cases; and one may be the buyer or the agent of the buyer, and yet be an aider and abettor in the sale, as has been said, and as is said in the Foster Case. The same may be said of the case of Young v. State, 58 Ala. 358. Since the court below instructed the jury in accordance with the theory here held, and refused to instruct on the opposite theory, as asked by defendant, the rulings were correct, and the case is affirmed.

NOTE.—The question involved in the principal case is novel and exceedingly close. There is something to be said on both sides of the controversy, though as we look at it a large proportion of those who give thought to the subject will take issue with the conclusion of the court, and adopt the view of the dissenting judges, who contend that the act for which defendant was sucessfully prosecuted is not a sale of intoxicating liquors, but a purchase by him for himself and as agent for others, which is not and cannot be within the contemplation of the act, making the sale of intoxicating liquors, without license, illegal. A similar case is Young v. State, 58 Ala. 358, where the court says that "one who commits an act which does not come within the words of a penal statute, according to the general and popular understanding of them, when they are not used technically, is not to be punished thereby, merely because the act contravenes the policy of the statute. * * * The real seller was the dealer in liquors of whom the whisky was bought. And the defendant, in getting it, was but

the agent of Blackwood, the purchaser." In Johnson v. State, 63 Miss. 288, where the facts were similar to those in the principal case, the court held that the act charged was not a sale but "a purchase by them and a division between them of the fruits of a joint and lawful investment." "So far as we have been able to discover," says Mr. Black in his work on Intoxicating Liquors, "there is but a single reported decision in which it has been held that the purchaser of liquor which is sold in violation of law is guilty of an offense against the statute." The case he referred to (State v. Bonner, 2 Head, 135) was afterward overruled by the same (Tennessee) court. Harney v. State, 8 Lea, 113. The reasoning of the court in State v. Bonner, *supra*, by which it was held that under a statute making it unlawful to sell liquor the person who bought was also guilty, was that the purchaser was as much to blame as the seller, and that the express prohibition to sell must be considered as implying a prohibition to purchase. This reason was disapproved in the later case of Harney v. State, 8 Lea, 113, the court holding that the offense was only *mala prohibita* not *mala in se* and the presumption should be that, if the legislature had intended to forbid the purchase as well as the sale of intoxicating liquor, they would have said so. Foster v. State, 45 Ark. 362, cited by the court in the principal case, it is contended does not sustain it and is not good law. In that case a person who purchased liquor for a minor was convicted of selling liquor to a minor. The correctness of that decision is attacked by the dissenting judges here upon the ground that as said by the Supreme Court of Alabama in a similar case the defendant "only aided the minor in making the purchase and he cannot be more guilty than the principal for whom he acted." Bryant v. State, 82 Ala. 52; Campbell v. State, 79 Ala. 271. Had the minor purchased, he would not have been guilty, and on principle it would seem that neither would the agent who purchased for him be guilty. "But whether that case be correct or not," says Riddick, J., in his dissenting opinion, "the distinction between it and the one here is broad. Had the liquor dealer in that case sold direct to the minor, or had he known that he was selling to an agent for a minor, he would have been guilty of violating the law; but in this case the distiller had the right to sell in five-gallon packages to joint as well as to single purchasers. The statute says he may sell in original packages of not less than five gallons, and there is nothing to forbid him from selling a five-gallon package to as many persons as wish to purchase it jointly. The opinion of the court concedes this, as it admits the right of sale to a club, composed, presumably, of more than one person. Now, if the distiller committed no crime in selling to several persons who purchased jointly, and the purchaser had the right to make a joint purchase, on what theory can the conviction of the defendant, who was only a purchaser, be sustained? The court seems to base its opinion on the fact that he solicited the other purchasers to join with him in the purchase, and afterwards divided the whisky between them in proportion to their interests. But, if parties may lawfully make a joint purchase, it cannot be unlawful, in the absence of any statute forbidding it, for one to solicit others to join with him in such a purchase, provided, of course, he does not act for the seller, and has no interest in the sale other than as a purchaser. If they have the right to make a joint purchase what law forbids them to divide it?"

## CORRESPONDENCE.

### WILL—DESTRUCTION OF CODICIL.

*To the Editor of the Central Law Journal:*

Whether or not the destruction of a codicil, the contents of which are unknown, will defeat the establishment of the will is an interesting question on which the authorities are very meager. We found none of recent years cited until we met the case *In re* Sternberg's estate reported in your issue of May 24th. Similar to this is the case of Pausch v. Jones decided by the Supreme Court of Ohio a little more than a year ago, without report. An opposite result was arrived at, however. In that case the testator made his will, giving all his estate to one child. Subsequently he made a codicil, giving part of his estate, how large a part was not known, to his other children. The codicil was pasted to the will. After the testator's death the will, with the codicil torn off and presumably destroyed, was presented for probate and was probated. Did the destruction of the codicil reinstate the original instrument? The court in overruling the demurrer to the petition setting up these facts found that it did not reinstate the original instrument, and the probate was set aside. The question was one, however, chiefly of statutory construction, for in Ohio there is a statute which reads as follows:

If, after the making of a will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will: or unless, after such destruction, canceling, or revocation, he shall duly republish his first will. In the absence of the statute a different result might have been reached, especially if it were shown that the testator destroyed the codicil and in fact intended thereby to reinstate the will. The trend of the decisions, irrespective of statutory enactment, is, however, unmistakably toward greater strictness in respect to the execution and proof of wills.

J. R. DAVIES.

Newark, Ohio.

## JETSAM AND FLOTSAM.

### RIVALS ON THE BENCH.

The Supreme Court of California may justly fear for its laurels. The reputation it has laboriously built up by its startling methods of interpreting whole clauses out of the written statutes and reversing the principles settled by a long line of precedents is in danger.

It is to be admitted in behalf of our Supreme Court that such masterly exploits as the decision in Hunt v. Ward, the two contradictory decisions in the Sharon case, the somersault in the Wallace Grand Jury case, and others that might be mentioned, cannot well be surpassed. Yet the latest ruling of the Wisconsin Supreme Court is one that may well put our judges on their mettle.

The brief summary of the case telegraphed to the press may not cover the points with legal accuracy, but the facts are substantially as follows: A was convicted for murder and sentenced to imprisonment for life. B thereupon married A's wife, conviction of felony with life imprisonment divorcing the parties to a marriage under the Wisconsin law. A appealed to the Supreme Court, which granted a new trial and set aside the judgment of conviction. A thereupon had

B arrested for adultery, of which he was convicted. The Supreme Court now reverses this conviction also on the ground that A's conviction granted an absolute divorce, and that B's marriage was therefore legal. The court has thus declared (1) that A was not convicted—the law being violated in the trial no conviction could be had, and the verdict was set aside; and (2) that A was convicted—for only a lawful conviction could work a divorce under the statute.

It will be agreed that this sets a mark in the way of extraordinary decisions that it is difficult to pass. Yet every loyal Californian will stake his money on our own Supreme Court. We cannot doubt that it has the ability to make a showing that will put the puny jurists of the Badger State in the position of mere tyros in the art of making the law a jest for the groundlings.—*San Francisco Examiner.*

INJURY BY LANDLORD TO ADJOINING PROPERTY.

This question has just been decided in the affirmative by the Court of Appeal in England in the case of the Corporation of Bradford v. Pickles, 1895, 1 Ch. 145. The defendant sank a shaft, ostensibly for the drainage of a quarry, but in reality to interfere with and cut off the supply of water flowing to plaintiff's wells and compel plaintiff to "buy him off." North, J., in the lower court (1895, 3 Ch. 53), considered the question quite at length and arrived at the conclusion that there is no authority in the English law for the proposition, that an act otherwise lawful is rendered unlawful because done with an evil motive. Lord Herschell agrees with this conclusion and Lindley and A. L. Smith, L. L. J., are of the same opinion. Lindley, L. J., says: "The only question a court of law or equity can consider is whether the defendant has a right to do what he threatens or intends to do." Probably no one would dispute that proposition; but as the question to be decided is whether the defendant "has a right to do as he threatens or intends to do," it is difficult to see how such a premise helps toward a considered conclusion. The case is not unlike that of Hague v. Wheeler, 157 Pa. St. 424, where the court held to the same effect as the English. But there are cases supporting the doctrine that where one man damages another, he must repair the damage unless he can justify it, and that he does not justify it upon a showing that he has been engaged in a deliberate and malicious effort to inflict that very damage. Chesley v. King, 74 Me. 174; Flaherty v. Moran, 81 Mich. 52. —*New York Law Review.*

## BOOK REVIEWS.

PATTISON'S MISSOURI DIGEST VOL. 1.

This supplementary digest of the Missouri reports embraces volumes one hundred and one to one hundred and twenty-one of the Missouri reports, volumes forty-two to fifty-eight of the Missouri Court of Appeals reports, and all the unreported Missouri cases in volumes twenty-five to twenty-seven of the Southwestern Reporter. In other words, it contains a digest of all Missouri cases since McQuillin's digest up to date. The only regret that members of the Missouri bar may have, in its perusal, is that its distinguished author could not have seen his way clear to the preparation of a complete digest of the Missouri reports from the beginning, for we feel sure that we voice the sentiment of the State bar in the assertion that our system of digests is, in one respect at least, exceedingly unsatisfactory and that is, in the number of volumes of digests which have to be examined (and the lawyer of limited income will add, purchased) in order to keep up with the decisions. We are aware, however, that upon this question much may be said in behalf of and from a publisher's point of view, to the effect that the profession do not liberally sustain an investment of that kind and that local digests as a rule, even at the price charged for them, yield no sufficient return to the publisher. Our readers do not need to be told that the author of this digest, a prominent member of the St. Louis bar, is also the author of the first comprehensive Missouri digest, still in constant use in the examination of the first sixty-seven volumes of the Missouri reports. That digest has long been of great service to Missouri practitioners and despite some slight criticisms which time has developed, it stands to-day as an excellent and accurate compendium of early Missouri precedents. The experience of Mr. Pattison in its preparation, together with that acquired as an active and vigorous practitioner, has been of value to him in the preparation of the present volume. We have before us only the first volume containing the subjects from A to K inclusive. We are informed that Vol. 2 will shortly make its appearance. We have no hesitation in asserting that the bar of the State will find this digest entirely satisfactory. It has evidently been prepared with care and attention to details; not thrown together as many digest are. The selection of subjects and sub-heads around which to group the points is excellent and the statements of points decided are clear and concise. We have given the book many practical tests of accuracy and efficiency, in each instance with favorable results. We feel called upon to commend also the excellent printing and binding of the book, its typographical appearance being a distinct improvement upon former digests. The fact that this digest embraces so many of the latest Missouri reports, examination of each being to the busy lawyer an impossibility, should put it into the hands of every Missouri practitioner. Published by The Gilbert Book Company., St. Louis.

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**

1. ACTION AGAINST INFANT—Jurisdiction.—In an action in a Federal Court in the nature of a suit *in rem*, seeking to subject certain property, in which an infant is interested, to the payment of partnership debts, the appointment of a guardian *ad litem* for such infant, upon application of the mother, was sufficient to give the court jurisdiction, without actual service upon the infant.—SLOANE V. MARTIN, N. Y., 40 N. E. Rep. 217.

2. ACTIONS AGAINST STATE.—Neither the constitution nor the legislature having granted authority to bring suits against the State, no liability arising under any contract or tort can be enforced against it.—IN RE SUBSTITUTE FOR SENATE BILL NO. 83, Colo., 39 Pac. Rep. 1088.

3. ACTION FOR INJURIES TO CHILD.—Under Gen. St. 1894, § 5164, a father may maintain an action in his own name to recover damages for an injury to his minor child, in all cases where, at common law, such an action might be maintained in behalf of such minor.—BUECHNER V. COLUMBIA SHOE CO., Minn., 62 N. W. Rep. 817.

4. ADMINISTRATION — Claims against Decedents.—Code, §§ 2408-2411, regulating the filing and allowance of claims against the estates of decedents, contemplates the filing of such claims with the clerk, and the filing only with the administrator is insufficient.—COREY V. GILLESPIE, Iowa, 62 N. W. Rep. 837.

5. ADVERSE POSSESSION—Evidence.—On an issue as to adverse possession, a decision, in an action against the same defendant by another plaintiff, that defendant held as mortgagee of the latter, to which action plaintiff was not a party, and which was brought long after plaintiff acquired title, is not admissible to show the character of defendant's possession.—LATTIE MORRISON V. HOLLADAY, Oreg., 39 Pac. Rep. 1100.

6. ADVERSE POSSESSION—Limitations.—Where limitations have begun to run against a married woman's claim to land during her life, it will continue to run against her heirs, though they are minors, and though their estate is postponed to the life estate of the surviving husband, as tenant by the curtesy.—BEATTIE V. WHIPPLE, Ill., 40 N. E. Rep. 340.

7. APPEAL—Res Judicata.—When a cause has been reversed and remanded with directions to enter a certain decree, and thereupon such a decree is entered by the trial court, such decree cannot be questioned on a further appeal, provided it conforms to the directions.—ROBY V. CALUMET & C. CANAL & DOCK CO., Ill., 40 N. E. Rep. 293.

8. APPEAL—Review.—Though a party relying upon the unconstitutionality of a statute, because of irregularities in its passage, need not plead its invalidity, he must present to the trial court the facts upon which he relies, and these must be preserved in the bill of exceptions, in order that the decision below may be reviewed.—MAREAN V. STANLEY, Colo., 39 Pac. Rep. 1086.

9. APPEAL—Waiver.—After judgment was rendered against the assignee of an insolvent debtor, in an action by him to set aside a mortgage given by the debtor, the assignee, in good faith and upon the advice of counsel, sold the mortgaged property by permission of the mortgagee, and applied the proceeds on the mortgage debt, and the mortgage was then discharged: Held, that the right of appeal was thereby waived by the assignee and the creditors whom he represented.—RAY V. HIXON, Wis., 62 N. W. Rep. 922.

10. ASSIGNMENTS FOR CREDITORS—Conveyances by Insolvent.—The statute of Washington relative to assignments for the benefit of creditors provides that "no general assignment of property by an insolvent or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective debts:" Held, following the decisions of the Washington courts, that such an assignment must be voluntary, and an actual intention to assign must exist, and that such an intention cannot be imputed to an insolvent debtor because he conveys or mortgages all his property to one or more creditors.—DRAKE V. PAULHAMUS, U. S. C. C. of App., 66 Fed. Rep. 895.

11. ASSIGNMENT FOR CREDITORS — Discharge of Assignor.—The discharge of an assignor in insolvency proceedings is not a bar to the foreclosure of a mortgage debt previously proved against his estate.—TRUSTEES OF WISCONSIN STATE GRANGE OF ORDER OF PATRONS OF HUSBANDRY V. KNIFFEN, Wis., 62 N. W. Rep. 943.

12. ASSUMPSIT—Loan to Bank — Recovery.—A bank obtained a loan from plaintiff, giving therefor the personal note of its cashier: Held, that the bank was liable to plaintiff for the amount of the loan, on a count for money had and received.—CHEMICAL NAT. BANK OF CHICAGO V. CITY BANK OF PORTAGE, Ill., 40 N. E. Rep. 329.

13. ATTACHMENT.—Where the affidavits in support of a motion to discharge an attachment only go to the question as to whether the property levied upon is a homestead or not, they are insufficient to authorize the judge at chambers to dissolve the attachment.—MASON V. LIEUALLEN, Idaho, 39 Pac. Rep. 1117.

14. ATTACHMENT LIEN—Sale.—A sheriff's deed for land sold under execution relates back to the date of the attachment, and cuts off all subsequent liens.—FIRST NAT. BANK OF PALOUSE CITY V. LIEUALLEN, Idaho, 39 Pac. Rep. 1108.

15. BANKS — Insolvent Banks — Deposits.—Where a bank, knowing itself to be insolvent, receives for deposit from the maker his check on another bank, and in the usual course of business, transfers it to a third bank, an allegation and proof of fraud of the first bank in receiving the check, knowing itself to be insolvent, as a defense to an action brought against the maker by the third bank, throws upon this bank the burden of proving that it is a *bona fide* purchaser for value.—GRANT V. WALSH, N. Y., 40 N. E. Rep. 209.

16. BILL OF EXCEPTIONS — Amendment.—Where the record recites that defendant excepted to the findings and judgment of the court, defendant may be permitted to withdraw and amend his bill of exceptions, so as to enable the appellate court to review the findings, though the judge who signed the bill is out of office.—PATRICK V. WESTON, Colo., 39 Pac. Rep. 1083.

17. BILL OF LADING — Pledge.—E & Co. were grain brokers in the city of A. Persons from whom they bought grain drew at sight on E & Co. for the price, and forwarded the drafts for collection, with the bills of lading of the grain attached. E & Co. arranged with the C Bank to take up these drafts, and hold them as demand notes against E & Co., with the bills of lading as security E & Co. claimed no control over or right to the bills of lading until they should take them up from the C Bank: Held that, though the payment of the drafts by the C Bank extinguished them as commercial paper, the bills of lading did not thereby become the property of E & Co., but the bank became the lawful holder thereof, and entitled to receive from the carrier the goods represented by such bills of lading,—at least, to the extent of the amounts paid on the drafts, with interest.—WALTERS V. WESTERN & A. R. CO., U. S. C. C. of App., 66 Fed. Rep. 862.

18. CARRIERS—Passenger—Contributory Negligence.—Independent of the statutory rule, a passenger who is placed in a position of apparent imminent peril through the negligence of a carrier may recover for injuries received while endeavoring to escape, in obedience to the natural instinct of self-preservation, provided he exercise ordinary prudence in view of the circumstances as they appear to him at the time.—ST. JOSEPH & G. I. R. CO. V. HEDGE, Neb., 62 N. W. Rep. 887.

19. CARRIERS — Passenger on Train by Mistake.—A railroad company owes to one on its train by mistake, and who has not paid his fare, the same duty of protection against negligence as to other passengers.—LEWIS v. PRESIDENT, ETC. OF DELAWARE & H. CANAL CO., N. Y., 40 N. E. Rep. 248.

20. CARRIERS OF PASSENGERS—Assault by Employee.—Under Sayles' Civ. St. art. 4258*b*, § 9, fixing the rates to be charged by railroads for carrying passengers when the fare is paid to the conductor, one who in good faith boards a passenger train without a ticket, intending to pay his fare to the conductor, becomes a passenger.—HOUSTON & T. C. R. CO. v. WASHINGTON, Tex., 30 S. W. Rep. 719.

21. CHATTEL MORTGAGES—Validity.—A chattel mortgage on property other than that authorized to be mortgaged by Civ. Code, § 2955, is, as a common-law mortgage, valid against all persons except subsequent creditors of the mortgagor and *bona fide* purchasers.—BANK OF UKIAH v. GIBSON, Cal., 39 Pac. Rep. 1069.

22. CONSTITUTIONAL LAW—Appropriations for Destitute Farmers.—Const. art. 5, § 34, providing that "no appropriation shall be made for charitable, industrial, educational or benevolent purposes, to any person, corporation, or community not under the absolute control of the State," prohibits an appropriation for the relief of destitute farmers in certain counties of the State.—IN RE RELIEF BILLS, Colo., 39 Pac. Rep. 1089.

23. CONSTITUTIONAL LAW — Legislative Apportionment.—Whether a legislative apportionment is constitutional is a question within the jurisdiction of the courts, though it involves only political rights.—PEOPLE v. THOMPSON, Ill., 40 N. E. Rep. 307.

24. CONTEMPT—Right to Trial.—A party proceeded against for a constructive contempt of court—that is one not committed in the immediate presence of the court—is entitled, as a matter of legal right, to a hearing upon the charge, and to have his witnesses examined in his defense.—STATE v. DISTRICT COURT, FOURTEENTH JUDICIAL DISTRICT, POLK COUNTY, Minn., 62 N. W. Rep. 831.

25. CONTINUANCE—Absence of Witness.—An application for a continuance, stating that a subœpna for a material witness for the defense was given to an officer in ample time to secure such witness' attendance, and that counsel learned four days before the trial that he had left the State, and that, though due inquiry had been made, his present residence was unknown, shows diligence, and a refusal to grant such continuance was error.—MISSOURI, K. & T. RY. CO. OF TEXAS v. HOGAN, Tex., 30 S. W. Rep. 686.

26. CONTRACT.—Plaintiff took defendant's minor son under a written contract to provide for and educate him, and to receive his services until he reached the age of 21 years, and to pay at that time a small sum for such services: Held that, upon breach of the contract by the defendant, an action would not lie to recover, upon an implied contract, the reasonable value of board, lodging, etc., furnished the son while in plaintiff's custody.—TIETZ v. TIETZ, Wis., 62 N. W. Rep. 939.

27. CONTRACT—Building Contract—Foreclosure.—In an action to recover a balance due upon a contract, and to foreclose a mechanic's lien therefor, a complaint alleging facts which establish defendant's personal liability for the amount due is not insufficient because it fails to allege that he owes any interest in the real estate against which the lien is sought to be enforced.—CLARK v. MAXWELL, Ind., 40 N. E. Rep. 274.

28. CONTRACT—Consideration.— Where land is conveyed in consideration of the promise of the grantee to sell it, and pay the proceeds to the grantor, and the grantee sells the land, a promise by the grantee, after the sale, to pay the same to the grantor, is an admission of the trust, and the trust is a consideration for the promise.—HARRIS v. CLARK, Iowa, 62 N. W. Rep. 854.

29. CONTRACT—Parties.—Where, in the contract for the sale of land, a person who has no interest in the land to be conveyed is made a payee in the contract, for the purpose of defrauding the owner of the land, the owner may sue to recover a balance due on the contract without making such person a party to the action.—GHOLSTON v. RAMEY, Tex., 30 S. W. Rep. 713.

30. CONTRACT OF MARRIED WOMAN.—A married woman cannot bind herself by a note signed by her to secure an antecedent debt of the husband, and to insure his faithful performance of a contract of agency made with plaintiff, to which the wife was a party.—EMERSON TALCOTT CO. v. KNAPP, Wis., 62 N. W. Rep. 945.

31. CORPORATION—Equity.—A court of chancery has no jurisdiction to dissolve corporations, except as specially conferred on it by statute. — PEOPLE v. WEIGLEY, Ill., 40 N. E. Rep. 300.

32. CORPORATION—Insolvent Corporation — Validity of Note.—An insolvent corporation does not violate Laws 1890, p. 1075, ch. 564, forbidding any transfer or assignment of its property in contemplation of insolvency, by giving a creditor, not an officer or stockholder, fractional notes payable on demand, in place of a note not due, so as to enable the creditor to immediately proceed on each note, in a court of limited jurisdiction, where the judgments can be obtained immediately by default, so that executions may be issued before a receiver is appointed.—FRENCH v. ANDREWS, N. Y., 40 N. E. Rep. 214.

33. CORPORATIONS—Liability of Stockholder. — One who subscribes for stock in a corporation, but only delivers the subscription to the soliciting agent to hold until he has investigated the matter, and who immediately investigates, and promptly forbids the delivery of the subscription, is not liable thereon.—GREAT WESTERN TEL. CO. v. LOEWENTHAL, Ill., 40 N. E. Rep. 318.

34. COUNTIES—Assessment for County Ditch.—County commissioners cannot legally transact county business except at a regular session of the county board, or one specially called by the county clerk, of which notice is given in the mode provided by law.—MORRIS v. MERREL, Neb., 62 N. W. Rep. 865.

35. COUNTIES—Defective Bridges.—The action of a board of county commissioners in rejecting a claim against the county for personal injuries caused by a defective bridge is ministerial, and not judicial, and such rejection will not bar a subsequent action against the board for such injuries.—BOARD OF COM'RS OF JACKSON COUNTY v. NICHOLS, Ind., 40 N. E. Rep. 277.

36. CRIMINAL LAW—Burglary.— An information for burglary, alleging that defendant entered a store with intent to steal in one county, and that he stole certain property, and removed it to another county, where the venue is laid, is not bad, as charging both burglary and grand larceny, under Pen. Code, § 786, providing that when property taken in one county by burglary has been brought into another county the jurisdiction of the offense is in either county.—PEOPLE v. JOCHINSKY, Cal., 39 Pac. Rep. 1077.

37. CRIMINAL LAW— Homicide— Self-defense. — One who makes a violent assault upon another is not justified in killing him in self-defense, after he has endeavored to abandon the difficulty, if the injuries inflicted by him were such as to deprive the person assaulted of his capacity to receive impressions concerning the assailant's design and endeavor to cease further combat.—PEOPLE v. BUTTON, Cal., 39 Pac. Rep. 1073.

38. CRIMINAL LAW—Homicide—Setting Spring Gun.—Whether one who, upon leaving his cabin to be absent a long time, set a spring gun containing a double charge of powder and shot, and a rifle cartridge on top, near the door, in such a position as to hit any one attempting to enter, had the right to do so, and whether the means used were reasonable for the protection of his property and the prevention of crime, is a question

of fact, and not of law, on a prosecution against him for the murder of one who was shot while attemptin g to enter the cabin to stay over night.—STATE v. BARR, Wash., 39 Pac. Rep. 1080.

39. CRIMINAL LAW—Waiving Preliminary Examination.—A defendant, unless a fugitive from justice, is entitled to a preliminary examination before he can be placed upon trial in a prosecution by information, unless he waives such examination, which he may do either when brought before the examining magistrate, or when called upon to plead to the information in the District Court.—COFFIELD v. STATE, Neb., 62 N. W. Rep. 875.

40. CRIMINAL PRACTICE—Robbery—Indictment.—An indictment which charges that the accused took property from an individual which was at the time in his possession as agent; that it was taken from him by force, and by putting him in fear,—sufficiently charges that the property was taken "from the person" of the individual, under Cr. Code, § 122, subd. 2, providing that an indictment must contain a statement of the facts in ordinary and concise language.— BRECKENRIDGE v. COMMONWEALTH, Ky., 30 S. W. Rep. 634.

41. DEATH BY WRONGFUL ACT—Action by Parent.—In an action under the provisions of section 5499, Comp. Laws, brought by a father, as administrator of the estate of his deceased son, who was of age, and who left no widow or child, and who was killed by the negligence of a railroad company, the father, if entitled to recover at all, was only entitled to recover such pecuniary damages as he sustained as such father (he being the only heir); and the charge of the court, so instructing the jury, was not erroneous.—SMITH v. CHICAGO, M. & ST. P. RY. CO., S. Dak., 62 N. W. Rep. 967.

42. DEED—Execution—Declarations.—On an issue as to whether deceased executed a deed to certain property, reserving therein a life estate to herself, declarations made by her, after the date of the alleged deed, while in possession of the land, and in the absence of the grantee, as to the character of her possession, are inadmissible.—ROBBINS v. SPENCER, Ind., 40 N. E. Rep. 263.

43. DEED TO WIFE — Statute of Frauds—Trust. — A debtor voluntarily conveyed land to his wife for the purpose of placing it beyond the reach of his creditors, and the wife orally agreed to hold the title for him, and to reconvey on request: Held that, as against him, her heirs had good title to the land, the trust being void under the statute of frauds, and the conveyance being good as between the parties.—MOORE v. HORSLEY, Ill., 40 N. E. Rep. 323.

44. DESCENT AND DISTRIBUTION.—Under Ter. St. 1889, p. 184, § 38, declaring that the land of a person dying without children shall descend equally to the next of kin in equal degree, the real estate of an intestate who left no children descended to his father and mother as tenants in common, and, upon the decease of the mother, her heirs were entitled to her share.—BROWN v. CITY OF BARABOO, Wis., 62 N. W. Rep. 921.

45. EMINENT DOMAIN — Condemnation— Damages.—While it is not competent to show the price at which other property has been sold, for the purpose of proving the value of that taken for railroad puposes, yet if, on cross-examination of witness for the adverse party, the railroad company adopts that line of inquiry, error will not be presumed from a re-examination confined to such line followed on cross-examination.—CHICAGO, R. I. & P. R. CO. v. GRIFFITH, Neb., 62 N. W. Rep. 868.

46. EMINENT DOMAIN— Railroad Companies.— It is well settled that after a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner, a subsequent vendee of the latter takes the land subject to the burden of the railroad, and the right to payment from the railroad company if it entered under an agreement to pay, or to damages if it entered without authority, belongs to the owner at the time possession was taken.—ROBERTS v. NORTHERN PAC. R. CO., U. S. S. C., 15 S. C. Rep. 756.

47. EQUITY — Trusts. — A delay of 13 years in enforcing an implied trust is such laches as will bar the suit.—MCLAFLIN v. JONES, Ill., 40 N. E. Rep. 330.

48. EVIDENCE — Foreign Statutes — Presumptions. — The laws of the State where a cause of action accrued will be presumed, in the absence of proof, to be similar to those of the State in which such action is brought.—SILLIMAN v. THORNTON, Tex., 30 S. W. Rep. 700.

49. EVIDENCE—Secondary Evidence.—A manuscript copy of a list of weights of certain cotton, taken from a letter-book impression of a letter into which such weights had been copied from the weigher's book, was not admissible in evidence to show the classification of the cotton, no sufficient excuse being shown for failure to produce the weigher's book, from which they were first copied.—EPPLER v. BROWN, Tex., 30 S. W. Rep. 710.

50. EVIDENCE OF PARTNERSHIP. — Where it was sought to hold the defendant liable as a member of a partnership firm, the mere statements of one who claimed to be acting for, and as a member of, said firm were not competent to establish the disputed partnership relation. — WEEKS v. PALMER DEPOSIT BANK, Neb., 62 N. W. Rep. 874.

51. EVIDENCE OF PEDIGREE.—Hearsay evidence relative to the pedigree and the circumstances of the death of a certain person, given by one whose only information came from "talks with the family" and "reports from his relations," neither the dates of such talks and reports nor the degree of relationship of the witness' informants to the person whose pedigree was in controversy being shown, was improperly received.—WALLACE v. HOWARD, Tex., 30 S. W. Rep. 711.

52. FEDERAL OFFENSE—Post Office—Embezzling Letters.—The statute making it a crime to take a letter from the post office, or which has been in any post office, "or in the custody of any letter or mail carrier before it has been delivered to the person to whom it is directed" (Rev. St. § 3892), does not extend to the case of a letter stolen from the desk of the addressee, upon which it has been placed by the mail carrier, in the absence of any one to receive it.—UNITED STATES v. SAFFORD, U. S. D. C. (Mo.), 66 Fed. Rep. 942.

53. FRAUDS, STATUTE OF — Indian Territory.—Act Cong. May 2, 1890, which put in force in the Indian Territory, among other laws, the statute of frauds, making void conveyances to defraud creditors, has no retrospective effect, and, before the passage of said act, it was competent for an insolvent debtor to give away his property, and deprive his creditors, who had not obtained liens, of the opportunity to collect their claims from such property.—MCCLELLAN v. PYEATT, U. S. C. C. of App., 66 Fed. Rep. 843.

54. GARNISHMENT—Fraud—Equity.—In his pleading controverting the answer of a wife, garnishee on execution issued under a judgment against her husband denying indebtedness to him, plaintiff alleged that she was indebted for conveyances made to her by him in fraud of creditors, and by reason of the execution to her of a mortgage upon personal property, largely exceeding in value the amount of the debt it was given to secure, and that this mortgage was fraudulently foreclosed, so as to defraud creditors: Held, that no equitable issue was raised, and a transfer of the cause to equity was error.—KELLEY v. ANDREWS, Iowa, 62 N. W. Rep. 853.

55. HABEAS CORPUS.—Under the act of 1893, relating to writs of error in criminal cases, which provides that one under sentence for a capital offense may, for cause shown, have a writ of error to the Supreme Court, a prisoner convicted of murder, who claims that the judgment of a State court violates his rights under the constitution or laws of the United States, must seek his remedy by writ of error, and not by

*habeas corpus* proceedings.—IN RE TYSON, Colo., 39 Pac. Rep. 1093.

56. HABEAS CORPUS—Conflicting State and Federal Jurisdiction.—Whether or not an indictment sufficiently charged the crime of murder in the first degree was for the State court to determine and the decision will not be reviewed on *habeas corpus* in the Federal court.—BERGEMANN V. BACKER, U. S. S. C., 15 S. C. Rep. 726.

57. HIGHWAY — Contributory Negligence.—It is not negligence, as a matter of law, to travel over a corduroy road having deep holes, caused by wear and rot, the road being covered with water from a heavy rain, in a wagon sufficient and prudently driven, but with a broken spring, and well loaded, it not being clear that the broken spring or the load had any agency in producing the accident.—LUEDKE V. TOWN OF MUKWA, Wis., 62 N. W. Rep. 931.

58. HIGHWAY — Damages. — The damages sustained by a landowner by reason of the location of a public highway cannot be paid out of the county-road fund, but must be paid out of moneys in the road fund of the road district in which the land taken for the highway is situated.—PALMER V. VANCE, Neb., 62 N. W. Rep. 857.

59. HUSBAND AND WIFE — Alienation of Husband's Affections.—A woman may maintain an action for the malicious alienation of her husband's affections.—RAILSBACK V. RAILSBACK, Ind., 40 N. E. Rep. 276.

60. HUSBAND AND WIFE — Antenuptial Settlement—Conflict of Laws.—By antenuptial settlement executed in Germany, the bride agreed "to receive the groom to live at her house," and the groom adopted the two children of the bride by a former husband. By the laws of Germany, children so adopted could not be disinherited. After some years the parties sold all their property, and moved to America with the children: Held, that the husband might devise land acquired by him in Illinois according to the laws of that State, regardless of the settlement.—LONG V. HESS, Ill., 40 N. E. Rep. 335.

61. HUSBAND AND WIFE—Deed.—Under Act March 27, 1869, enabling a married woman to convey her land by "joining with her husband in the execution" of the deed, a deed from husband and wife to which the wife signs her own name and also her husband's, passes good title to her land, since in the absence of proof to the contrary, it will be presumed that she wrote his name by his direction.—DEAN V. SHREVE, Ill., 40 N. E. Rep. 294.

62. INSURANCE—Representations as to Title.—Where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon does not invalidate the policy.— INSURANCE CO. OF NORTH AMERICA V. BACHLER, Neb., 62 N. W. Rep. 911.

63. INSURANCE — Waiving Condition. — Notice and proof of loss are waived when an insurance company denies liability on the ground that its policy was not in force when the loss occurred.—GERMAN INS. & SAV. INST. V. KLINE, Neb., 62 N. W. Rep. 857.

64. INTOXICATING LIQUORS — Illegal Sale.—A complaint charging a person with selling intoxicating liquors without license in a certain county, without naming any city or village in which the alleged offense was committed, sufficiently complies with Rev. St. §§ 4657-4659, reciting the requirements of a criminal complaint.—STATE V. HICKOK, Wis., 62 N. W. Rep. 934.

65. INTOXICATING LIQUORS—Sales on Sunday.—Under an indictment for keeping open a tippling house on the Sabbath day, it is only necessary to prove that a house where liquors were habitually sold in small quantities was kept open for the purpose of sale to any person who wanted to buy, and that facilities for drinking the same were furnished by defendant.—HARRIS V. PEOPLE, Colo., 39 Pac. Rep. 1084.

66. JUDGMENTS—Collateral Attack.—A judgment rendered in a Federal court, in an action removed from a State court, cannot be collaterally attacked for want of proper jurisdictional allegations in the petition for removal.—PULLMAN'S PALACE CAR CO. V. WASHBURN, U. S. C. C. (Mass.), 66 Fed. Rep. 790.

67. JUDGMENT—Nunc pro Tunc Entry.—The province of a *nunc pro tunc* entry is to correct the record of the court in a cause so as to make it set forth an act of the court which, though actually done at a former term thereof, was not entered upon the journal; and it cannot lawfully be employed to amend the record so as to make it show that some act was done at a former term which might or should have been, but was not, then performed.—CLEVELAND LEADER PRINTING CO. V. GREEN, Ohio, 40 N. E. Rep. 201.

68. LANDLORD AND TENANT—Breach of Covenant.—The measure of damages for the loss of the use of leased premises is "the full rental value" of the premises for the term, and if the rent has not been paid the measure of damages is the difference between "the actual rental value (that is, the value of the use of the premises) and the rent reserved, estimated for the terms of the lease."—LEICK V. TRITZ, Iowa, 62 N. W. Rep. 855.

69. LANDLORD AND TENANT—Subletting.— A sublease of a portion of a building, given by one holding a lease on the entire building for a term of five years, is a conveyance of an "interest in lands," within How. Ann. St. § 6179, providing that no interest in lands, other than leases for one year, shall be conveyed by parol.—FRATCHER V. SMITH, Mich., 62 N. W. Rep. 732.

70. LIFE INSURANCE — Application.—A charge that false representations in an application for life insurance, to the effect that the applicant's habits are "correct and temperate," will not avoid a policy based on the truth of such application, unless they were "willfully and intentionally made, and known at the time to be false," was error.—STANDARD LIFE & ACCIDENT INS. CO. V. LAUDEDALE, Tenn., 30 S. W. Rep. 732.

71. LIFE INSURANCE—County.—Where the by-laws of a mutual benefit society state its object to be to promote the welfare of all its members, and to furnish substantial aid to their families "or assigns," the right of the insured to chose his beneficiary is unrestricted, and therefore a policy payable to the insured's "legal representatives" is not merely for the benefit of insured's immediate family, so as to be entirely payable to his widow in case he leaves no children, as against distant relatives.—SULZ V. MUTUAL RESERVE FUND LIFE ASS'N, N. Y., 40 N. E. Rep. 242.

72. LIFE INSURANCE POLICY — Construction.—A life insurance policy insuring the life of a father was issued upon an application signed by both the father and the son, in which the latter was named as beneficiary. The policy was made payable to the "assured" after due notice of the death of the "person whose life is hereby insured:" Held to be a contract made with the son in his own name and for his own benefit.—CYRENIUS V. MUTUAL LIFE INS. CO. OF NEW YORK, N. Y., 40 N. E. Rep. 225.

73. LIFE TENANT — Purchase of Outstanding Title.—An executrix and life tenant, in possession of lands of which her testator owned the equitable title, who buys in the outstanding legal title, supposing it to be necessary for the protection of the estate, paying therefor, out of her own moneys, a sum wholly disproportionate to the value of the land, holds the legal title so purchased in trust for the remainder-men.—MOORE V. SIMONSON, Oreg., 39 Pac. Rep. 1105.

74. LIMITATIONS — Reformation. — The statute of limitations will not run against the right of a purchaser of land who entered into possession, and whose title has never been disputed, to have the description in the deed corrected to make it conform to the original intention of the parties.—PAYNE V. ROSS, Tex., 30 S. W. Rep. 670.

75. LIMITATIONS—Release of Surety.—After a note is barred by statute of limitations, the liability of a surety thereon cannot be revived by payments made,

without his knowledge or consent, by the maker.—DOUGHERTY v. HOFFSTETTER, Ind., 40 N. E. Rep. 278.

76. MANDAMUS — Review.—A *mandamus* proceeding, under our Code of Civil Procedure, is an action at law, and can be reviewed only on error, and cannot be appealed.—STATE v. AFFHOLDER, Neb., 62 N. W. Rep. 871.

77. MASTER AND SERVANT — Assumption of Risk.—Plaintiff, while stationed as a lookout near the front end of cars which were being pushed along a spur track, was thrown forward by a collision with a car standing on the track, and injured. Brush overhung the track, and obscured the view: Held, that it was a question for the jury whether or not plaintiff assumed the risk attendant on such condition of the track.—OREGON SHORT LINE & U. N. RY. CO. v. TRACY, U. S. C. C. of App., 66 Fed. Rep. 931.

78. MASTER AND SERVANT—Liability of Master for Acts of Servant.—A master is not liable for the acts of his servant committed outside the line of his duty, and not connected with the master's business.—WESTERN UNION TEL. CO. v. MULLINS, Neb., 62 N. W. Rep. 880.

79. MASTER AND SERVANT—Negligence — Assumption of Risk.—When the condition of a saw mill and the relative situations of the deceased and his fellow-servants would suggest, to a person of common intelligence, manacing and obvious perils from the use and operation of the machinery, an employee who continues to work in it assumes the risk, though it arises from the negligence of the employer.—PETERSON v. SHERRY LUMBER CO., Wis., 62 N. W. Rep. 948.

80. MASTER AND SERVANT—Negligence.—In an action by a railroad engineer for personal injuries received while running his engine in violation of the rules of his employer, where there is evidence that these rules had been violated so habitually that the company was presumably aware of such violations and approved of them, it is proper to refuse instructions in regard to the violation of such rules that omit all reference to the question of the company's acquiescence therein.—CHICAGO & W. I. R. CO. v. FLYNN, Ill., 40 N. E. Rep. 382.

81. MECHANIC'S LIENS—Priority to Mortgage.—In a contest for priority as between a mortgage filed for record August 21, 1890, and a claim for a mechanic's lien in which the material was alleged to have been delivered "between August 21, 1890, and January 22, 1891," held, that the word "between" excluded the 21st, from which it resulted that the lien of the mortgagee was senior and superior to that of the material-man.—WEIR v. THOMAS, Neb., 62 N. W. Rep. 871.

82. MORTGAGES—Partial Payment — Assignment. — Where a mortgagor gives a note as a conditional part payment of a mortgage debt, the note after assignment by the mortgagee, and while in the hands of a third person, operates as a partial payment on the mortgage.—FITCH v. IRON NAT. BANK OF PLATTSBURGH, N. Y., 40 N. E. Rep. 205.

83. MUNICIPAL BUILDINGS—Power of City Council.—Under Laws 1891, ch. 93, § 10, giving the board of public works power, "by and under the direction of the common council," to enter into contracts for the work of constructing a library and museum building, the common council should determine the kind of building to be constructed, and procure plans therefor.—KOCH v. CITY OF MILWAUKEE, Wis., 62 N. W. Rep. 918.

84. MUNICIPAL CORPORATION—Action Against—Claim. —The words "claim or demand," as used in Laws 1891, ch. 160, subc. 5, § 4, providing that no action shall be maintained against the city upon any claim or demand until the same shall have been presented to the council and disallowed, apply to actions upon contract only, and not to those for injuries caused by defective sidewalks.—SOMMERS v. CITY OF MARSHFIELD, Wis., 62 N. W. Rep. 937.

85. MUNICIPAL CORPORATION—Election — Mandamus. —Rev. St. 1893, ch. 24, art. 4, § 11, declaring that "in case of a tie in the election of any city or village officer it shall be determined by lot, in the presence of the city council or board of trustees, in such manner as they may direct," imposes upon the council a duty enforceable by *mandamus* on the relation of one of the candidates—PEOPLE v. CRABB, Ill., 40 N. E. Rep. 319.

86. MUNICIPAL CORPORATION. — Improvements. — Where the records of confirmation of a special assessment show that the court acted upon *prima facie* proof that proper notice had been given to the property owners, the judgment of confirmation is conclusive as to the fact of such notice, when questioned upon application for a judgment for a delinquent special assessment.—CHICAGO & W. D. RY. CO. v. PEOPLE, Ill., 40 N. E. Rep. 342.

87. MUNICIPAL CORPORATION— Sewer Assessments.—The necessity for a sewer is a matter to be determined by the municipal officers, and, unless there has been an abuse of discretion, the courts cannot interfere, even though the officers have erred in judgment.—COBURN v. BOSSERT, Ind., 40 N. E. Rep. 281.

88. MUNICIPAL CORPORATION—Water-works—Validity of Sale.—The water-works of a city, constructed under a power conferred upon the city by its charter "to construct and maintain water-works" for protection against fires and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, and constructed and maintained at the expense of the inhabitants of such city, are held as the property of the municipal corporation, for public use, and charged with a public trust, of which the inhabitants of such city are the beneficiaries. — HURON WATER WORKS CO. v. CITY OF HURON, S. Dak., 62 N. W. Rep. 975.

89. NEGOTIABLE INSTRUMENT—Action—Bona Fide Purchaser.—Where, in an action on a note, defendant alleges equities against the original payee, and plaintiff proves that he acquired the note before maturity, in the ordinary course of business, and for a valuable consideration, the burden is on defendant to show that plaintiff had notice of existing defenses.—WRIGHT v. HARDIE, Tex., 30 S. W. Rep. 675.

90. NEGOTIABLE INSTRUMENTS—Indorsements.—Where a negotiable promissory note has been before maturity indorsed to a third person, the maker of the note must, in order to avail himself of the defense of payment before the indorsement, plead and prove that the plaintiff had notice of such payment before the indorsement.—YENNEY v. CENTRAL CITY BANK, Neb., 62 N. W. Rep. 872.

91. NEGOTIABLE INSTRUMENT — Usurious Note—Attorney's Fees.—The obligation imposed by a provision in a note for the payments of 10 per cent. attorney's fees is not affected by the fact that it was inserted for the sole benefit of the payee, and not with any purpose of paying the amount to an attorney.—STURGIS NAT. BANK v. SMYTH, Tex., 30 S. W. Rep. 678.

92. NEGOTIABLE INSTRUMENT—Validity—Corporation. —In the absence of evidence to the contrary, it will be presumed that the managing president of a corporation engaged in loaning money, and in buying and selling negotiable instruments, has authority, as such, to transfer by indorsement a promissory note made payable to such corporation.—MERRILL v. HURLEY, S. Dak., 62 N. W. Rep. 958.

93. NEGOTIABLE PAPER—Accommodation Drawer.—The drawer of an accommodation bill of exchange, the drawee of which is authorized to sell it and receive the proceeds, cannot defend an action thereon by a *bona fide* purchaser on the ground that the drawee applied the proceeds in violation of an understanding between him and the drawer.—MORELAND'S ASSIGNEE v. CITIZENS' SAVINGS BANK, Ky., 30 S. W. Rep. 637.

94. OFFICERS DE FACTO—Validity of Acts.—In order to protect the public, and prevent a failure of justice, the apparently official acts of one having color of authority to hold and perform the duties of a public officer are valid in respect to the rights of interested third persons, but void as far as they may be of exclusive

interest or ultimate benefit to him.—FYLPAA V. BROWN COUNTY, S. Dak., 62 N. W. Rep. 962.

95. PARTNERSHIP—Mortgage.—It is within the power of one member of a partnership, acting in good faith, to make a valid chattel mortgage of all the partnership property to insure partnership indebtedness. — SETTLE V. HARGADINE-MCKITTRICK DRY GOODS CO., U. S. C. C. of App., 66 Fed. Rep. 850.

96. PRACTICE—Operation of Electric Car.—The standard of ordinary care is not absolute, but varies according to the circumstances and the possible or probable danger from the use of the instrument; and in the case of a heavy electric car, operated at considerable speed in the streets of a city, it is not error to modify a request for instruction that the company, operating such car, is required to use ordinary care, by pointing out that a higher degree of caution is required in managing such car than in managing ordinary vehicles.—CINCINNATI ST. RY. CO. V. WHITCOMB, U. S. C. C. of App., 66 Fed. Rep. 915.

97. PRINCIPAL AND AGENT—Power to Employ Men.—Evidence that an agent of a mill owner had charge "of all matters in relation to the mill, hired the men and discharged them," and "ran the entire thing," will, in the absence of any proof of usage to the contrary, support a finding that such agent had authority, in contracting for the services of a foreman for a certain time, to agree to take the risk of his competency.—ROCHE V. PENNINGTON, Wis., 62 N. W. Rep. 946.

98. RAILROAD AND WAREHOUSE COMMISSION—Regulation of Rates.—In proceedings, under the statutes of this State, before the railroad and warehouse commission, or, on appeal, in district court, to regulate and fix the rates, fees, charges, or classifications of a common carrier, another carrier, not a party to the proceeding, although indirectly affected by the determination, cannot be permitted, as a matter of right, to intervene, to be made a formal party, and thus, in a measure, control the case.—APPEAL OF GREAT NORTHERN RY. CO., Minn., 62 N. W. Rep. 826.

99. RAILROAD COMPANIES—Foreign Corporations.—A State statute, declaring it unlawful for any foreign corporation to own or acquire property in the State, or do any business there, without first filing a copy of its charter in the office of the secretary of State, and an abstract thereof in each country in which it desires to do business, does not take it out of the power of a railroad company previously owning property, and authorized to do business in the State, to make a valid sale of all such property, without first complying with the provisions of the statute.—CHATTANOOGA, R. & C. R. CO. V. EVANS, U. S. C. C. of App., 66 Fed. Rep. 809.

100. RAILROAD COMPANY — Injuries at Crossing—Negligence.—Failure to look and listen before driving on a crossing is not excused by the fact that a train had recently passed in the same direction, where plaintiff had time after the passing of such train to cross the track and drive a block and return and recross the track, and was injured while attempting to cross for the third time.—SMITH V. WABASH R. CO., Ind., 40 N. E. Rep. 270.

101. RAILROAD COMPANY—Injuries to Passenger.—Act March 6, 1891, imposes a penalty on a railroad company failing to keep its passenger depot open, lighted, and warmed "for a time not less than one hour before the arrival and after the departure of all trains carrying passengers:" Held, that the time so fixed was not the limit of the company's legal duty, as regards a passenger injured by the failure to warm the waiting room of the depot while she was waiting for a delayed train.—TEXAS & P. RY. CO. V. CORNELIUS, Tex., 30 S. W. Rep. 720.

102. RAILROAD COMPANY—Recovery of Goods Shipped.—Where goods are delivered to a railroad company to be delivered to the consignee upon the payment of drafts drawn upon him by the consignor for the price, and an agent of the company wrongfully delivers the goods without payment of the drafts, the railroad company, as trustee of an express trust, may recover the price for which the consignee sold the goods after the wrongful delivery.—STARKER V. MCCOSH IRON & STEEL CO., Iowa, 62 N. W. Rep. 848.

103. RAILROAD COMPANY—Street Car—Negligence.—Where defendant's motoneer saw plaintiff when the car was a block from the crossing, but failed to use ordinary care to avoid the accident, defendant is liable for resulting injuries to plaintiff, though plaintiff was negligent in failing to look for an approaching car.—ORR V. CEDAR RAPIDS & M. C. RY. CO., Iowa, 62 N. W. Rep. 851.

104. REAL ESTATE AGENT—Commissions.—Where one is, by agreement, to receive commissions for procuring a purchaser for land only on condition that the sale was made to a certain proposed purchaser, he cannot recover if the sale to such purchaser was not consummated owing to the fault of either of the parties.—LYLE V. UNIVERSITY LAND & INVESTMENT CO., Tex., 30 S. W. Rep. 723.

105. RECEIVER.—Under Act Cong. March 3, 1887, which declares that every receiver appointed by a Federal court may be sued without previous leave of that court, but that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice," a judgment rendered against a receiver by a State court in an action at law is conclusive as to the existence and amount of plaintiff's claim, and the filing of an intervention by the owner of the judgment for the purpose of having it paid does not give the Federal court jurisdiction to annul the claim altogether.—GARRISON V. TEXAS & P. RY. CO., Tex., 30 S. W. Rep. 725.

106. RECEIVER—Appointment—Insolvency of Corporation.—Under Laws 1887, p. 119, providing that a receiver may be appointed for an insolvent corporation, the claim of a creditor asking for a receiver need not have become a judgment, or an express lien on the corporate property.—SAN ANTONIO & G. S. R. CO. V. DAVIS, Tex., 30 S. W. Rep. 693.

107. RELEASE OF RIGHTS IN PARENT'S ESTATE.—A written contract between a father and his children, whereby the latter accepted money in full payment for all their present and future interest in the father's estate, and released the estate from all claims by them as heirs, legatees, or devisees, estops such children, if they have taken no steps to cancel the contracts and return the money, to contest the validity of a will afterwards made by the father.—GORE V. HOWARD, Tenn., 30 S. W. Rep. 730.

108. RELIGIOUS SOCIETIES. — Under a provision in a church constitution that it shall not be altered unless by the "request" of two-thirds of the whole society, a proposed change may be laid before the society by its highest church judiciary; and, after the society has expressed its wish for such change, it may be made by such judiciary.—KUNS V. ROBERTSON, Ill., 40 N. E. Rep. 343.

109. REMOVAL OF CAUSES.—Any right which a party may have to remove to a Federal court a cause which was pending in the Supreme Court of a territory at the time of its admission as a State is not waived if he files his petition for transfer in the State Supreme Court before that court has taken any action in the case.—KOENIGSBERGER V. RICHMOND SILVER MIN. CO., U. S. S. C., 15 S. C. Rep. 751.

110. REMOVAL OF CAUSES—Record.—The petition for removal of a cause from a State to a Federal court forms part of the record in such cause, and when such record, including the petition, shows the suit to be one of which the Federal court would have original jurisdiction, it may be removed.—SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD V. WILSON, U. S. C. C. of App., 66 Fed. Rep. 785.

111. RES JUDICATA—Replevin and Trespass.—A dismissal of an action of replevin for want of prosecution

is no bar to an action of trespass for the same taking.—STEIR v. HARMS, Ill., 40 N. E. Rep. 296.

112. SALE OF SCHOOL LANDS — Validating Act.—Where plaintiff, who held land under a void sale, voluntarily abandoned the same, the provisions of a validating act did not inure to his benefit, and a quitclaim deed made by him three years after the purchase and adverse occupancy of defendant was ineffective to convey title.—NORMAN v. MCCLEARY, Tex., 30 S. W. Rep. 712.

113. SET-OFF — Pleading. — Overpayments, made through mistake, and payments made by defendant as surety on an obligation to plaintiff, subsequently paid off by the principal debtor, are available as a set-off in an action for goods sold and delivered and money loaned, although not available as a counterclaim, because not arising out of the same transaction.—ARTHURS v. THOMPSON, Ky., 30 S. W. Rep. 629.

114. TAXATION — Architects—Occupation Tax.—The occupation of an architect can be made the subject of a privilege tax.—COOK v. CITY OF MEMPHIS, Tenn., 30 S. W. Rep. 742.

115. TAXATION — Exemptions— Corporation.—A foreign manufacturing corporation authorized by its charter to manufacture, buy, and sell, or otherwise procure, electric apparatus of all kinds, and engaged in the manufacture of such apparatus, and also in buying and selling the same, in New York State, is not wholly engaged in carrying on manufacture, and hence it is taxable on the amount of its capital employed in the State.—PEOPLE v. CAMPBELL, N. Y., 40 N. E. Rep. 239.

116. TAXATION — Omitted Taxes.—Rev. St. 1893, ch. 120, § 276, provides that if any property shall be omitted in the assessment of any year, or the tax thereon, from any cause, has not been paid, or if any such property, by reason of defective description or assessment, shall fail to pay taxes for any year, the same shall be listed by the assessor, and placed on the assessment and tax books, and the arrearages, with 10 per cent. interest thereon, shall be charged against such property by the county clerk: Held, that said section has no application to the case of land which has been listed, assessed, and placed on the tax books, although some of the taxes levied thereon have not been extended by the county clerk.—HAYWARD v. PEOPLE, Ill., 40 N. E. Rep. 287.

117. TOWNS—Negligence of Officers.—The laying out of ditches by the supervisors, under Rev. St. ch. 54, is the exercise of a police power, and the municipality cannot be held liable for their acts.—STATE v. MCNAY, Wis., 62 N. W. Rep. 917.

118. TRUSTS—Following Trust Funds.—Where goods sold on credit to an insolvent firm, through its fraud, were subsequently resold to its customers, and the firm's vendor afterwards discovered the fraud and rescinded the sale, equity has jurisdiction to follow the proceeds of the resales into the hands of the firm's assignee for the benefit of creditors, and subject them to a lien in favor of the defrauded vendor.—AMERICAN SUGAR REFINING CO. v. FANCHER, N. Y., 40 N. E. Rep. 206.

119. VENDOR AND VENDEE — Mortgages.—A grantee in a deed made of property previously mortgaged, subject to the mortgage, does not become personally liable for the mortgage debt, in the absence of an agreement on the part of such grantee to assume the payment of the mortgage.—GRANGER v. ROLL, S. Dak., 62 N. W. Rep. 970.

120. VENDOR'S LIEN — Assignment.—Where the deed expressly reserves a vendor's lien, the superior title to the land conveyed remains in the vendor, on the death of the vendee, and the vendor's lien on the proceeds of the land, sold by the vendee's administrator, is superior to the claim of the vendee's family for the yearly allowance and claims for funeral expenses or the general administration expenses.—JACKSON v. IVORY, Tex., 30 S. W. Rep. 716.

121. WATER—Surface Water—Negligent Obstruction.—The doctrine of this court is the rule of the common law, that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor.—LINCOLN & B. H. R. CO. v. SUTHERLAND, Neb., 62 N. W. Rep. 859.

122. WILL — Charities—Organization not Existing.—Decedent's will bequeathed money to "the Old Ladies Home in Iowa, if any such is organized in the State;" if not, then to a similar institution in Ohio: Held, that the bequest vested at testator's death, and could not go to an institution thereafter organized.—BOND v. HOME FOR AGED WOMEN OF CEDAR RAPIDS, Iowa, 62 N. W. Rep. 838.

123. WILL—Devise—Duration of Estate.—Under Rev. St. § 2278, providing that every devise of land shall be construed to convey all the estate of the testator therein, unless it appear, by the will, that testator intended to convey a less estate, a devise of all the residue of testator's property, both real and personal, wherever situated, to a devisee, his heirs or assigns, carries the fee simple of an undivided interest in land not otherwise disposed.—HILES v. ATLEE, Wis., 62 N. W. Rep. 940.

124. WILLS—Indefinite Bequest.—A provision in a will requesting the sole legatee to give to the sister of the testatrix "any presents she may need and that my estate can afford" is too indefinite and uncertain to create a trust in the devised estate in favor of the sister.—WEBSTER v. WATHEN, Ky., 30 S. W. Rep. 663.

125. WILLS—Jurisdiction of Federal Courts.—A will having been established by competent authority, the federal courts have jurisdiction to determine its interpretation, in an action between citizens of different States.—WOOD v. PAINE, U. S. C. C. (R. I.), 66 Fed. Rep. 807.

126. WILL—Rule in Shelley's Case.—A testator devised certain land to complainant and his heirs, and, in a subsequent clause of the will, declared that, on death of complainant without heirs of his body, the land should go to certain named persons: Held that, under the rule in Shelley's Case, complainant took a fee, and that the subsequent clause of the will was invalid as inconsistent with it.—EWING v. BARNES, Ill., 40 N. E. Rep. 325.

127. WILL—Trust—Perpetuities.—A clause directing that the estate devised to testator's children should be held in trust, the income to be paid to the children during their lives, but that on the death of any child the portion willed to him should descend to his child or children, and if any one of testator's children died without issue his portion should be divided among testator's surviving children, does not conflict with the rule against perpetuities.—DAVENPORT v. KIRKLAND, Ill., 40 N. E. Rep. 304.

128. WILLS—Vesting of Estate.—One clause of testator's will required the "sale of my farm as soon after my decease as it can be done," and provided that certain of the proceeds should be invested for the widow's benefit for life, and "after her decease be equally divided among my children:" Held, that the interest of the children in such sum vested upon testator's death, subject to the widow's life enjoyment thereof.—IN RE HURLBUTT'S ESTATE, N. Y., 40 N. E. Rep. 226.

129. WITNESS—Transactions with Decedent.—Under Code, § 3639, providing that no party to, or person interested in, the result of an action, shall be examined as to any personal transaction or communication between himself and one at the commencement of such examination deceased, against the executor, legatee, devisee, etc., one contesting the probate of a will cannot testify as to conversations between himself and the testatrix, relative to the disposition of her property.—IN RE GOLDTHORP'S ESTATE, Iowa, 62 N. W. Rep. 845.